S. HRG. 101-647

RADIATION VICTIMS FAIR TREATMENT ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS AND ADMINISTRATIVE PRACTICE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 982

A BILL TO REPEAL A PROVISION OF FEDERAL TORT CLAIM LAW RELATING TO THE CIVIL LIABILITY OF GOVERNMENT CONTRACTORS FOR CERTAIN INJURIES, LOSSES OF PROPERTY, AND DEATHS, AND FOR OTHER PURPOSES

AUGUST 3, 1989

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RADIATION VICTIMS FAIR TREATMENT ACT

THURSDAY, AUGUST 3, 1989

U.S. SENATE,
SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:12 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Howell Heflin (chairman of the subcommittee) presiding.

Also present: Senator Grassley.

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HEFLIN. I welcome my distinguished colleagues and the witnesses who are here today for this hearing on S. 982, the Radiation Victims Fair Treatment Act. A similar bill was passed by this subcommittee during the 100th Congress, and we look forward to the hearing today to explore the merits of this legislation.

This bill would repeal what has become known as the "Warner amendment", that provision of the law passed as part of the 1985 Defense Authorization Act, which allows the United States to be substituted as a party defendant in cases brought against defense contractors for suits arising out of atomic weapons testing.

However, the United States, under the Federal Tort Claims Act, is able to exercise its sovereign immunity and thereby have lawsuits arising from atomic weapons testing dismissed. As a result, victims of atomic radiation who previously were able to sue Government contractors prior to the Warner amendment are unable to bring successful lawsuits today.

The effect of the legislation before the committee today would be to repeal the Warner amendment.

I understand there are differing views as to the merits of this legislation, and we look forward to today's testimony.

Senator Grassley, do you have an opening statement?

Senator GRASSLEY. Mr. Chairman, I am just going to submit my opening statement for the record and thank you for holding this hearing. I know for the people involved this is a very important issue to them, and it will get fine consideration through your leadership.

That is all I have to say.

[Prepared statements of Senators Grassley and Thurmond, along with a copy of S. 982, follow:]

STATMENT OF SENATOR CHARLES E. GRASSLEY
SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE
HEARING ON S. 982
AUGUST 3, 1989

MR. CHAIRMAN, TODAY WE AGAIN PAUSE TO CONSIDER THE TRAGIC CASE OF THE HUNDREDS OF THOUSANDS OF SERVICEMEN, CIVILIAN GOVERNMENT WORKERS, EMPLOYEES OF PRIVATE CONTRACTORS AND DOWNWIND CIVILIANS AFFECTED BY EXPOSURE TO RADIATION AS PART OF OUR GOVERNMENT'S ATOMIC WEAPONS TESTING PROGRAM.

THE PROPOSED SOLUTION, AGAIN, IS TO PERMIT THESE PRIVATE PARTIES TO BRING LAWSUITS AGAINST VARIOUS GOVERNMENT CONTRACTORS. THIS SOLUTION IS TEMPTING. IT IS SIMPLE, STRAIGHTFORWARD, AND APPEALS TO OUR SENSE OF JUSTICE BY GIVING PEOPLE "THEIR DAY IN COURT".

THE ATTRACTIVENESS OF THE PROPOSAL TO REPEAL THE WARNER AMENDMENT IS DEMONSTRATED BY THE IMPRESSIVE ARRAY OF COSPONSORS TO S. 982. IT IS A TRIBUTE TO THE DEDICATED EFFORTS OF THOSE WHO SINCERELY BELIEVE THAT THEY HAVE BEEN DEPRIVED OF THEIR ONLY LEGAL REMEDY.

MR. CHAIRMAN, I AM NOT A LAWYER, BUT I AM A KEEN OBSERVER OF OUR CIVIL JUSTICE SYSTEM. I FRANKLY BELIEVE THAT LITIGATION IS ALMOST NEVER A SOLUTION TO PEOPLE'S PROBLEMS. THIS IS PARTICULARLY TRUE IN THIS CASE, WHERE THESE VICTIMS SIMPLY CAN'T AFFORD TO WAIT THROUGH YEARS OF DISCOVERY, TRIAL, AND APPEAL. THEY NEED TO HAVE THEIR PHYSICAL AND MEDICAL NEEDS CARED FOR <u>NOW</u> -- NOT BASED ON THE FALSE HOPE OF SOME LARGE, BUT SPECULATIVE, RECOVERY IN COURT YEARS FROM NOW.

MOREOVER, OUR FEDERAL COURTS ARE ALREADY CHOKED BEYOND RECOGNITION WITH PENDING CASES, CIVIL AND CRIMINAL. THE FEDERAL COURTS STUDY COMMITTEE, ON WHICH I AND THE CHAIRMAN SERVE AT THE INVITATION OF CHIEF JUSTICE REHNQUIST, IS CURRENTLY STUDYING WAYS TO <u>REDUCE</u> THE COURTS' WORKLOAD AND THE

OPPRESSIVE TRANSACTION COSTS ASSOCIATED, SO THAT CITIZENS GET RELIEF FASTER AND WITH LESS EXPENSE. FAR TOO OFTEN, CONGRESS CREATES DRAMATIC NEW CAUSES OF ACTION, WITHOUT SO MUCH AS A NOD TO WHAT IT MIGHT MEAN TO THE OVERALL ADMINISTRATION OF JUSTICE IN AMERICA.

HAVEN'T WE LEARNED THAT MERELY PROVIDING A NEW CAUSE OF ACTION -- WITHOUT ANY MEASURE OF THE IMPACT ON THE COURTS -- IS A DISASTROUS APPROACH? WORSE, THE LITIGATION "SOLUTION" WORKS AS A CRUEL HOAX ON THE INTENDED BENEFICIARIES; IT HOLDS OUT THE PROSPECT FOR RECOVERY, BUT FRUSTRATES THE VICTIMS BY DELAY AND EXPENSE. SIMPLY REPEALING THE WARNER AMENDMENT WILL DO NOTHING TO SOLVE THE ENORMOUS PROOF PROBLEMS THAT PLAINTIFFS WILL FACE, ATTEMPTING TO LINK THEIR EXPOSURE TO CURRENT DISEASE. SIMPLY REPEALING THE WARNER AMENDMENT MAY GIVE SOME MEMBERS A WARM FEELING, AND IT WILL SURELY BRING A SMILE TO A LAWYER'S FACE, BUT IT WILL MEAN SCANT LITTLE FOR THOSE WHO NEED HELP THE MOST.

MR. CHAIRMAN, THESE PEOPLE DON'T NEED LAWYERS, THEY NEED MONEY TO PAY THEIR MEDICAL BILLS, TO CARE FOR THEIR SICK OR TERMINALLY ILL.

IF THE GOVERNMENT IS RESPONSIBLE, AND THE EVIDENCE STRONGLY SUGGESTS THAT IT IS, THEN LET'S CREATE A COMPENSATION SYSTEM OUTSIDE OF THE COURTS TO PROVIDE RELIEF -- FASTER, WITHOUT LITIGATION EXPENSES, WITHOUT HAVING TO PROVE FAULT, AND WITHOUT LENGTHY APPEALS.

AT A MINIMUM, MR. CHAIRMAN, WE WOULD BE GROSSLY NEGLIGENT IF WE DIDN'T AT LEAST REQUEST THE ADMINISTRATIVE OFFICE OF THE COURTS TO ASSESS THE WORKLOAD IMPACT OF THIS BILL ON THE COURTS. I WOULD BE HAPPY TO WORK WITH THE CHAIRMAN TO OBTAIN THIS NECESSARY INFORMATION.

STATEMENT BY SENATOR STROM THURMOND (R-S.C.) BEFORE THE SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE. REFERENCE, HEARING ON S.982, A BILL TO REPEAL THE WARNER AMENDMENT REGARDING INJURIES SUSTAINED DUE TO RADIATION EXPOSURE. THURSDAY, AUGUST 3, 1989, 2:00 PM, ROOM SD-226.

MR. CHAIRMAN:

We are here today to consider S.982, a bill which I have cosponsored along with 36 other Senators. S.982 would repeal section 1631 of the Department of Defense Authorization Act of 1985. Section 1631, commonly referred to as the Warner Amendment, provides that government contractors in atomic energy defense programs are considered instrumentalities of the Federal Government, and therefore, are not subject to suit by private individuals for disorders caused by the research, development, and testing of nuclear weapons.

S.982 would repeal the Warner Amendment and restore to veterans and civilians, claiming exposure and injury from ionizing radiation, a right to bring suit against government contractors for alleged negligent acts. This legislation does not provide any guarantee of compensation, but merely re-establishes the right to a day in court. It is appropriate that the individuals covered in the bill have a right to pursue a legal remedy.

When addressing the prospect of increased government liability, we must insure that the matter is approached in a compassionate, yet sound manner. Based upon rights of idemnification included in defense contracts, the Federal Government would ultimately be responsible for paying any judgment rendered as a result of these suits.

In closing, it is most important that those suffering service connected health problems have the right to pursue fair and appropriate remedies in a court of law. For these reasons, S.982 should receive this Subcommittee's careful consideration.

I look forward to hearing from our distinguished panelists regarding all the possible ramifications of this legislation.

II

101ST CONGRESS
1ST SESSION

S. 982

To repeal a provision of Federal tort claim law relating to the civil liability of Government contractors for certain injuries, losses of property, and deaths, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 12 (legislative day, JANUARY 3), 1989

Mr. REID (for himself, Mr. BRYAN, Mr. WARNER, Mr. SIMON, Mr. CRANSTON, Mr. DECONCINI, Mr. MITCHELL, Mr. METZENBAUM, Mr. THURMOND, Mr. HATCH, Mr. DASCHLE, Mr. BRADLEY, Mr. HOLLINGS, Mr. MCCAIN, Mr. ROCKEFELLER, Mr. WIRTH, Mr. SHELBY, Mr. PELL, Mr. GRAHAM, Mr. CHAFEE, Mr. SANFORD, Mr. MATSUNAGA, Mr. MOYNIHAN, Mr. RIEGLE, Mr. SASSER, Mr. HARKIN, Mr. BURDICK, Mr. KOHL, Mr. KERRY, Ms. MIKULSKI, Mr. GARN, Mr. ADAMS, Mr. GORE, Mr. ROBB, Mr. LEVIN, and Mr. KENNEDY) introduced the following bill; which was read twice and referred to the Committee on Judiciary

---

A BILL

To repeal a provision of Federal tort claim law relating to the civil liability of Government contractors for certain injuries, losses of property, and deaths, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "Radiation Victims Fair Treatment Act".

REPEALER

SEC. 2. Section 1631 of the Department of Defense Authorization Act (98 Stat. 2646) (relating to the application of the remedy against the United States provided by sections 1346(c) and 2672 of title 28, United States Code, or by the Act of March 9, 1920, to any civil action for an injury, or death described in subsection (a)(1) of such section 1631) is repealed.

APPLICATION

SEC. 3. (a)(1) The period during which section 1631 of the Department of Defense Authorization Act (98 Stat. 2646) was in effect shall not be taken into account in computing the period provided in any Federal or State statute of limitations applicable to any civil action for an injury, loss of property, personal injury, or death described in subsection (a)(1) of such section.

(2) In civil actions which were filed before the date of enactment of section 1631 of Public Law 98–525, and were subsequently dismissed pursuant to the provisions of such section, the period beginning with the initial filing of such action and ending with the repeal of such section shall not be taken into account in computing the period provided in any Federal or State statute of limitations applicable to such civil actions.

(b) If the period provided in any Federal or State statute of limitations applicable to a civil action referred to in subsec-

tion (a) expires within one year after the date of the enactment of this Act, the action shall not be barred by such statute, but shall be forever barred if not commenced within one year after such date.

○

Senator HEFLIN. All right. We are going to try and move as rapidly as we can. We are in the closing hours before recess, therefore written statements will be made part of the record. We would like all the witnesses to summarize their testimony within 5 minutes. We don't want to be rude to anybody, but most of us have got about 15,000 things to do between now and recess, so we'll try to move expeditiously and thoroughly, but please summarize—I am not speaking to you, Senator Bryan. I know you are always to the point and get exactly your words in a brief manner—but I am speaking to the other witnesses who will be coming before us.

We are delighted to have Senator Richard Bryan to testify at this time.

STATEMENT OF HON. RICHARD BRYAN, U.S SENATOR, STATE OF NEVADA

Senator BRYAN. Mr. Chairman, thank you very much.

From 1945 through 1962, there were more than 200 above-ground atomic tests, the vast majority of which occurred about 90 miles from my home in Las Vegas. As a young man, I remember the spectacle of seeing the fireballs lighting the sky; and I recall, as a student, a science teacher telling us that because we know what the speed of sound is that we could actually calculate the distance from the site of the detonation to where we were actually observing the event itself.

Depending upon the circumstances of a particular test, radioactivity fallout was spread in southern Nevada, southern Utah, and northwestern Arizona from these tests. The residents of the affected areas—and I can attest to it personally—were told that there was absolutely no reason for concern, no reason for anybody to be excited in terms of the public health concerns. Indeed, some of our Army personnel were brought within a few thousand yards of ground zero at a place that was called Camp Desert Rock for purposes of those tests.

Let me skip over my testimony a bit and move forward and recite that until 1984, a citizen who believed an illness had been induced by reason of radioactive exposure could seek relief in court for damages against the nuclear weapons testing contractor who conducted the testing program.

In the Defense Reauthorization Act of 1985, a statutory provision was added that substituted the U.S. Government in place of defense contractors in any such suits.

Mr. Chairman, because of your own extensive legal background—and I know that Senator Grassley has followed this issue as well—you understand the implications of that substitution in terms of the legal frustrations presented to any potential claimant who would have to file suit against the Federal Government and the immunities that attach to the Federal Government as a party defendant vis-a-vis the legal position of an individual contractor.

The effect of the amendment became extraordinarily difficult for claimants to seek relief. The purpose of this legislation is to address that injustice and that inequity. That part of our history has now passed for all but those who have been affected as a consequence of those tests. This is simply an effort to seek justice and

equity for those who have such claims, and I am delighted to join with my senior colleague from Nevada as well as the very distinguished senior Senator from Virginia in urging this committee to act upon this legislation.

I believe, Mr. Chairman, we may have set a record. I think we are less than 5 minutes. I thank you for the Chair's indulgence.

Senator HEFLIN. Bless you.

[Prepared statement of Senator Bryan follows:]

STATEMENT OF SENATOR BRYAN
S. 982, the Radiation Victims Fair Treatment Act
August 3, 1988

From 1945 through 1962 there were more than 200 above ground atomic tests, the vast majority of which occurred at the Nevada Test Site. As a youth in Las Vegas, I can recall the spectacle of fireballs rising in the night sky.

Depending on the circumstances of a particular test, radioactive fallout was spread in southern Nevada, southern Utah, and northwestern Arizona from these tests.

The residents of the affected areas were told very little of the dangers they were exposed to by these tests. Although the scientific knowledge of radiation's health effects may was less extensive then than it is now, those in charge of the testing program elected not to conduct tests when the conditions might send the fallout toward Las Vegas or Los Angeles, suggesting that the fallout was a genuine concern--at least in relation to the more densely populated areas.

Until 1984, a citizen who believed an illness had been induced by radiation exposure could seek relief in court for damages against the nuclear weapons testing contractor's who conducted the testing programs.

In the Defense Reauthorization Act of 1985 a statutory provision was added that substituted the United States government in place of defense contractors in radiation damage suits. Because of the federal Tort Claims Act and governmental immunity that provision effectively eliminated the right of a citizen to seek relief for radiation damages in the courts.

Since the effect of the amendment became evident, many in Congress have supported repeal.

This is merely a question of equity and fairness. To deny injured citizens the right to bring an action against defense weapons testing contractors is inequitable. Those who have suffered from radiation induced disease or death are innocent victims of the tests which were conducted early in the atomic age to assist in our nation's defense. The time has come to resolve this injustice.

Senator HEFLIN. Senator Warner, we are delighted to hear from you next.

STATEMENT OF HON. JOHN W. WARNER, U.S. SENATOR, STATE OF VIRGINIA

Senator WARNER. Mr. Chairman, Senator Grassley—Chairman Heflin, you and I came to the Senate together 10 years ago, and you recall that brief period in which the Republicans were in the majority in the U.S. Senate, and at that time I was chairman of the subcommittee of the Armed Services Committee that dealt with a wide range of matters relating to atomic/nuclear/fissionable weapons.

One day, I walked into a markup where there was a large stack of papers, and there were some people there from the administration who said, Senator, this is a bill that the administration wants to put through. I glanced at it and made a mistake, did not check it carefully enough. I put it in the markup, and it went flying through. And then we awakened that a mistake had been made.

I have admitted it from the first day that we made a mistake. And now I appear before you, as I have previously for several years, not only to admit a mistake was made, but to ask that it be changed.

It seems to me it is very simple. We just give a certain class of Americans who took unusual risks, risks that we today, no matter how modern the technology, cannot fully assess, and to give that class of Americans the right to be heard by a court of law to adjudicate whether or not they are entitled to assistance.

I'd like to put in the balance of my statement, but I have hit the high points fairly and squarely.

I thank the Chair and I thank the Senator from Iowa. [Applause.]

Senator HEFLIN. I believe you brought your cheerleaders with you.

Senator WARNER. I was unaware that I had a cheering group. I simply walked in in a very humble way, and I acknowledge and appreciate it.

Senator HEFLIN. Thank you, Senator Warner.

[Prepared statement of Senator Warner follows:]

STATEMENT BY SENATOR WARNER ON BEHALF OF S. 982
August 3, 1989

MR. CHAIRMAN: I APPRECIATE YOUR COURTESY IN ALLOWING ME TO TESTIFY TODAY ON BEHALF OF S. 982, THE "RADIATION VICTIMS FAIR TREATMENT ACT." AS YOU KNOW THIS BILL WOULD REPEAL THE WARNER AMENDMENT TO THE 1985 DOD AUTHORIZATION BILL.

WHEN I INSERTED THIS PROVISION, AT THE REQUEST OF THE ADMINISTRATION, I WAS UNDER THE IMPRESSION THAT THIS WOULD BENEFIT THESE VETERANS, CIVILIAN WORKERS AND THEIR SURVIVORS. HOWEVER, WHAT RESULTED WAS AN UNEXPECTED DISMISSAL OF HUNDREDS OF DAMAGE SUITS BROUGHT ON BY THOSE AFFECTED. LET ME REPEAT THAT THIS WAS A COMPLETELY UNEXPECTED AND INADVERTENT RESULT.

MR. CHAIRMAN, TODAY YOUR COMMITTEE HAS AN OPPORTUNITY TO CORRECT THIS INJUSTICE BY GIVING THESE VETERANS THEIR RIGHT TO HAVE THEIR DAY IN COURT. IF THIS BILL WERE TO BECOME LAW, THE LITIGANT WOULD STILL HAVE TO PROVE THAT THE DEFENDANT WAS NEGLIGENT. BUT AS THE LAW STANDS THESE VETERANS CAN'T EVEN HAVE THAT OPPORTUNITY TO HAVE A TRIAL BEFORE A JURY OF THEIR PEERS. LET ME EMPHASIZE, MR. CHAIRMAN, THAT THIS BILL WILL NOT PROVIDE FOR ANY DIRECT PAYMENT BY THE U.S. GOVERNMENT TO THESE VETERANS, CIVILIAN WORKERS OF THEIR SURVIVORS, FOR IT JUST GIVES THEM A RIGHT TO BE HEARD BY A COURT OF LAW.

LAST YEAR, SIMILAR LEGISLATION PASSED THE HOUSE AND THE FULL SENATE JUDICIARY COMMITTEE. I HOPE THAT DURING THIS SESSION OF CONGRESS THIS BILL WILL BECOME LAW. I ASK FOR A SWIFT AND FAVORABLE RECOMMENDATION BY THIS COMMITTEE.

Senator HEFLIN. Senator Reid.

STATEMENT OF HON. HARRY REID, U.S. SENATOR, STATE OF NEVADA

Senator REID. Thank you very much, Mr. Chairman.

I know that my colleagues have a lot of things to do—Senator Bryan has the Hastings panel—and they certainly would not upset me if they had to go and do other things.

Before Senator Warner—on his way out, I should say I have admired Senator Warner from before I came back here and certainly, having come back here and being able to serve with him, and listening to something like I did today only puts in concrete the thoughts that I had before I got back here. It is a very courageous thing that he did, and we are all grateful for his admitting what took place.

Thank you very much from me, Senator Warner.

Senator HEFLIN. And I might like to comment on that, that if the Republicans had not gained control of the Senate at that time, this never would have happened. [Laughter.]

Senator WARNER. Thank you, gentlemen.

Thank you, Mr. Chairman.

Senator REID. Mr. Chairman, I come here today to speak on behalf of American victims of radiation exposure. Many of these victims are no longer living, and many more suffer chronic pain and overwhelming disabilities. Today we must pay our respect to these men and women who were harmed by our country's actions. We must rectify the wrongs to which they have been subjected.

These individuals are not only victims of radiation—they are also victims of grave injustice that has effectively denied them their day in court. They have been stripped of their ability to seek redress from the courts.

That is why I introduced with Senator Bryan the Radiation Victims Fair Treatment Act, and that is why this proposed legislation is supported by a long list of cosponsors.

How has it come to pass that we have so shamefully ignored the plight of Americans who worked at or lived near the sites of aboveground nuclear testing?

Between 1946 and 1962, approximately 235 atomic tests were conducted by the United States. Until 1985, those who incurred injuries or sickness as a result of radiation exposure could file suit against the contractors who participated in the program.

As we have heard already, the 1985 Defense Authorization Act changed that. This provision, section 1631, stated basically that all radiation victim cases would fall under the Federal Tort Claims Act. The Federal Government was therefore accorded certain immunities that any courtroom defendant would year for. Among the rights now denied to radiation victims is, of course, trial by jury.

The immunities conferred to the Federal Government effectively bar favorable judgments on behalf of veteran and civilian plaintiffs. In fact, section 1631 has resulted in the abrupt dismissal of approximately 50 lawsuits, some of which had multiple plaintiffs, that had been filed by veterans and their widows against nuclear

weapons contractors, including the University of California, Los Alamos and Lawrence Livermore Laboratories, and AT&T.

The 1985 provision also adversely affected the rights of approximately 220 civilians and employees at the Nevada nuclear test site. These people had filed suit against their former employer, Reynolds Electric and Engineering. The Radiation Victims Fair Treatment Act would repeal section 1631 of the 1985 Defense Authorization Act, thus restoring to individuals their right to seek redress.

It is significant to note, as I have already mentioned, that Senator Warner has been before this committee. It is unfortunate and troubling that we have not yet rectified the wrongs perpetrated upon the victims of radiation exposure. They have suffered far too much already. It is time we faced the fact that employees at test sites and civilians downwind from the tests in Nevada and Utah were not warned of the dangers that would come their way.

The least we can do is to recognize our fault and attempt to minimize the effects of these tests on the health and lives of the victims.

In the lawsuit of Alice Broudy, who is testifying here today, the court acknowledged the wrongs that had been done to this country's radiation victims. The judge stated: "The Government has been aware of the hazards of radiation since the inception of the nuclear weapons program." The judge cites a number of different documents indicating that the Government knew exposure to radiation could cause cancer, genetic defects, decreased fertility, cataracts, and leukemia, among other things.

It stands to reason that the university and corporate contractors also knew about these dangers—knew about them from the time that the tests commenced.

These horror stories of victims are endless. Bonnie McDaniel left her employment at the Nevada test site after 1½ years, at which time she was told she had been exposed to large quantities of radiation and should not have dental or lung x rays. Her son, Shaun, who is now 20, was born with a cleft lip, no stomach muscles, and "Elephant Man" disease. He had the first of many operations when he was only 3 days old.

Nobody told Bonnie McDaniel that the nuclear testing was dangerous—nobody at the test site, nobody in the U.S. Government—nobody.

In another of many tragic cases, Bennie Levy, a friend of mine who worked at the Nevada test site for 27 years, noticed in 1956 that all his friends were dying. After researching the death certificates of 330 fellow workers, he found that 202 had died of colon cancer. Mr. Levy is now the president of the Nevada Test Site Radiation Victims Association—and I might add, Mr. Chairman, he is sick.

Kent Carroll was tending sheep downwind from nuclear testing in 1953. He was 16 years old. After 9 years of acute suffering, he died of pancreatic cancer.

Veterans and employees at the test sites, as well as innocent downwinders, have made tremendous sacrifices in the name of American security and national defense. These patriotic citizens deserve better treatment from this country and this Government that they have so honorably served. They deserve fair treatment. They

deserve their day in court to seek redress from the parties responsible for the radiation.

It is unconscionable that we drag our heels. Some of the radiation victims with unheard claims have died, and many others are dying. Let those who are still alive and the families of those who have died know that we understand their suffering. Let us bestow upon them the dignity and respect they so rightly deserve.

This bill does not guarantee compensation. What it does do is restore to radiation victims the basic American right to judicial redress. It is the honorable way to address the issue, and I firmly believe that it is the only way left.

Thank you a lot, Mr. Chairman, members of the committee.

Senator HEFLIN. Thank you, Senator Reid.

Senator Grassley, do you have any questions?

Senator GRASSLEY. Just one, Mr. Chairman.

Senator Reid, just for reaction, because I guess there is more than one way to skin a cat, and I guess I'd like to have your reaction to the proposal like the Hatch bill that would create an administrative compensation system to provide compensation to any radiation victims without resort to litigation, and particularly if you might think that this would be worth studying to see if it might make more sense in terms of providing more relief to more victims in a faster and cheaper way than our usual litigation process might take us.

Senator REID. I support Senator Hatch's measure. The problem with that is it has upfront, as I understand it, a money figure tied to it. I would think that there is nothing wrong with going ahead with this legislation. I think it will pass long before that which has a dollar mark attached to it. This does not. This simply allows people to go to court and to sue the parties that they believe are responsible for the harm that they have suffered.

Senator GRASSLEY. Thank you, Senator Reid.

Senator HEFLIN. Thank you, Senator Reid.

Our next witness is Mr. Stuart E. Schiffer, Acting Assistant Attorney General, Civil Division, U.S. Department of Justice.

STATEMENT OF STUART E. SCHIFFER, ACTING ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. SCHIFFER. Thank you. Good afternoon, Mr. Chairman, Senator Grassley. We appreciate the opportunity to be here today.

My statement, as I understand it, will be submitted in full for the record, and mindful of your schedule and the fact that many of these issues have been discussed by prior Congresses, I will, if I may, try to address only a single point this afternoon and then to respond to any questions the committee might have.

Implicit in—in fact, explicit, in my testimony that will be heard today and has been heard is the assumption that the so-called Warner amendment, section 1631 of the 1985 Defense Authorization Act, represents some sort of radical departure from the norms by which the liability or the potential liability of the Government or its contractors is traditionally judged. In all candor and in all honesty, this is simply not an accurate assumption.

The first thing that section 1631 does, essentially, is to codify the relationship which existed from the outset of the nuclear testing program between the Government and the contractors who operated the national laboratories. From the very start, the contractor's responsibility has been to facilitate the achievement of national policies which all recognized were of the highest strategic importance. As we know, these policies were first set forth by Presidents Roosevelt and Truman at times of great national emergency.

In short, section 1631 simply recognizes that the parties who should be responsible for any litigation are the United States; that the only logical way to approach potential litigation arising out of radiation or alleged radiation injuries was to bring these claims within the ambit of the Federal Tort Claims Act. This is precisely what section 1631 does.

The Tort Claims Act for over 40 years now, since 1946, has been the statutory regime under which the Government's liability is adjudicated as against all types of tort claims asserted against the United States. There is simply, I submit, despite the compassionate appeal of specific groups of plaintiffs, despite the emotion which quite properly surrounds many of these issues, there is simply no basis for us repeatedly to single out special classes of plaintiffs and bring them within other regimes. Essentially requiring the contractors once again to be responsible for this litigation would simply be requiring the contractors to seek to justify in litigation discretionary decisions made by executive branch and military officials. The present regime recognizes that the United States should be the defendant. The exceptions which have prevented many of these cases from being tried on the merits are exceptions to the liability of the United States which are applicable to all sorts of plaintiffs.

Now, Congress has, as we note in our testimony, seen fit, and quite properly so, to express concerns and to try and see that statutory benefit claims are properly asserted and heard, principally with respect to veterans. In each of the last several Congresses, Congress has addressed the needs of veterans. They have gone so far in the last Congress to specify 13 types of cancer with respect to which presumptions of service connection exist. Congress has legislated comprehensively for all veterans by ensuring judicial review in the last Congress for these claims. We hope we evidence no lack of compassion when we say that the Federal Tort Claims Act is a proper scheme to judge the liability of the United States as against its citizens.

I'd be happy to respond to any questions you might have.

[Prepared statement of Mr. Schiffer and answers to questions submitted by Senators Heflin, Grassley, and Thurmond follow:]

U.S. Department of Justice

Washington, D.C. 20530

STATEMENT

OF

STUART E. SCHIFFER
ACTING ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

BEFORE THE

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE
SENATE COMMITTEE ON THE JUDICIARY

CONCERNING

S. 982

A BILL "TO REPEAL A PROVISION OF FEDERAL TORT CLAIM LAW RELATING TO THE CIVIL LIABILITY OF GOVERNMENT CONTRACTORS FOR CERTAIN INJURIES, LOSSES OF PROPERTY, AND DEATHS, AND FOR OTHER PURPOSES"

ON

AUGUST 3, 1989

I am pleased to appear before the Subcommittee today to present the views of the Department of Justice on S.982, a bill which would permit suits against government contractors for acts and omissions in carrying out the Atomic Weapons Testing Program.

I need hardly remind this Subcommittee that nuclear weapons tests must be viewed against the backdrop of national security concerns. The Ninth Circuit has summarized the historical setting of the litigation against the government and its contractors:

> The atmospheric nuclear weapons tests took place between the closing days of World War II and the adoption of the Partial Nuclear Test Ban Treaty of 1963. Even before these tests, the United States Government had enlisted the scientific resources of industrial firms and universities in the program to develop an atomic bomb. The Manhattan Project, which ultimately produced the bomb detonated over Hiroshima, was an unprecedented joint effort by the government, universities and industry.
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> * * * *
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> When the AEC took over the nuclear weapons program from the military, it acquired a complex of plants, laboratories and other facilities staffed by some 2,000 military personnel, 4,000 civilian government employees and 38,000 employees of contractors. The integral role of contractors, which started in the Manhattan Project, continued under the AEC. The University of California, Sandia Corporation and Reynolds Electrical and Engineering Co., Inc., were among those contractors.
>
> Escalating international tensions, marked by the Berlin blockade in 1948, the confrontation with the Soviet Union over Czechoslovakia, Greece and Iran, the detonation by the Soviet Union of an atomic device in 1949, and the Korean War led the government to assign the highest priority to

> the development and production of nuclear weapons. Weapons tests were an essential part of that effort.
>
> These tests were regarded as critical to national security. Presidents Eisenhowser and Kennedy and the Chairman of the AEC made public statements stressing the vital importance of tests to the development of modern weapons needed to assure national security in the face of the threat posed by the Soviet Union. Indeed, atmospheric nuclear weapons testing was a major issue in United States-Soviet relations during this period. [In re Consolidated United States Atmospheric Testing Litigation, 820 F.2d 982, 984-85 (9th Cir. 1987), quoting the District Court decision, 616 F. Supp. 789 (N.D. Cal. 1985).]

In 1984, the Congress enacted Section 1631 of Public Law 98-525, the Department of Defense Authorization Act of 1985 (42 U.S.C. § 2212). Section 1631 is a fair and reasonable means of accepting Federal responsibility for the litigation arising out of the atomic weapons testing program -- a quintessentially federal activity.

Section 1631

Let me set forth the essential provisions of Section 1631 of Public Law 98-525. Section 1631 requires that the United States be substituted as the party defendant in a suit against a contractor when the Attorney General certifies that an action is brought against a contractor, as defined in Section 1631, and that the action alleges injury "due to exposure to radiation based on acts or omissions by a contractor carrying out an atomic weapons testing program contract with the United States."

Pursuant to regulations promulgated under Section 1631(b),[1] the Department of Justice has received more than 130 requests from contractors for certification. None of these requests have been denied.

Section 1631 creates an exclusive remedy -- a cause of action solely against the United States -- for injuries "due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States." Any suit arising from specified activities of these contractors is to be maintained pursuant to pre-existing provisions of the Federal Tort Claims Act, "without regard to when the act or omission occurred." A savings provision enables plaintiffs to file administrative claims pursuant to the Federal Tort Claims Act even if their claims might otherwise be deemed barred.

Each District Court that has heard any suit attacking the constitutionality of Section 1631 has rejected all of the arguments presented seeking to invalidate the Act. In addition, two appellate courts have upheld Section 1631 in very well considered and carefully crafted opinions. In re Consolidated United States Atmospheric Testing Litigation, 820 F.2d 982 (9th Cir. 1987); Hammond v. United States, 786 F.2d 8 (1st Cir. 1986). There is no contrary authority.

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[1] The regulations and delegations of authority implementing Section 1631 are set forth at 49 Fed. Reg. 4995 (November 14, 1984) (amending 28 C.F.R. § 15.3(c)(3)), and 49 Fed. Reg. 47583 (December 5, 1984).

We believe it is appropriate for the government to assume liability for the activities of federal contractors engaged in the federal atomic weapons testing program. The House Committee on Armed Services cogently explained the backdrop to this legislation:

> The Committee recognizes, as has the Congress, that the military applications of atomic energy could not proceed either technically or economically without the participation of organizations that possess both scientific management skills and a high degree of scientific and technical expertise. Several such organizations were placed under contract almost at the inception of the nuclear weapons program in 1942 and have performed in an outstanding manner in the national interest for more than three decades.

The Senate Committee on Armed Services similarly recognized the critically important fact that:

> . . . only the government sets a policy, makes the decisions, and controls activities and circumstances regarding atomic weapon research, development and testing. Consequently, these contractors were utilized by the United States as instruments of national policy to assist in this entirely governmental task.
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> * * *
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> Each nuclear test that has been made since 1946 has been made under the statutory direction of Congress. Each nuclear test has been approved, before the fact, by the President of the United States. Each nuclear test has been under the direct supervision of government officials. Each nuclear test has been participated in by hundreds, and in some cases thousands, of government officials and military and civilian personnel.

Under these circumstances, it clearly would be unfair for the contractors to remain a party to suits arising from the Atomic Weapons Testing Program.

Moreover, we firmly believe that the liability of the United States should be as provided under the Federal Tort Claims Act. Section 1631 substituted the United States for contractor defendants in both pending and future suits alleging radiation injuries arising from this national defense program. In doing so, Section 1631 placed the litigation within the purview of the Federal Tort Claims Act and gave the plaintiffs the same rights against the United States that any other plaintiffs have suing the United States for injuries arising out of activities which are federal responsibilities -- no more and no less. Section 1631 did not blur "the distinction between a Federal Instrumentality and a Contractor." It took into account concerns that a result which would permit "extension to contractors of the jurisdictional limitation of Federal liability in the Federal Tort Claims Act" would set an undesirable precedent by leading "other contractors to demand similar protection under the tort claims provisions of title 28."[2] Instead, the status of the nuclear weapons contractors as contractors with the United States remains unaffected by Section 1631, but the litigation filed

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[2] H. Rept. No. 98-124, 98th Cong., Part IV, at 4.

against the contractors is sensibly enough deemed to be litigation against the United States.[3]

It should be clearly stated that Section 1631 does provide a new cause of action against the United States. In general, the United States cannot be sued for activities of atomic weapons program contractors arising out of their operations under their contracts. See, e.g., Bramer v. United States, 595 F.2d 1141 (9th Cir. 1979); Blaber v. United States, 332 F.2d 1629 (2d Cir. 1964). Thus, Section 1631 provides a right to sue the United States, notwithstanding the contractor exclusion to the FTCA (28 U.S.C. § 2671), where no right to sue the United States had heretofore existed. In short, Section 1631 substitutes the United States for contractor defendants in radiation injury suits arising from the atomic weapons testing program, precludes reliance upon the contractor exclusion from the Federal Tort Claims Act, and provides a new remedy against the United States for acts or omissions of nuclear weapons contractors subject only to the same terms and conditions upon suit that are applicable in any other suit filed against the United States under the Federal Tort Claims Act.

In its decision upholding Section 1631, the Ninth Circuit spoke directly to the relevant policy considerations:

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[3] The United States may not raise the "contractor exclusion" in defense of suits filed under Section 1631. Section 1631(a)(2). However, the concern that the distinction between the federal government and contractors remain intact for all other purposes is otherwise met.

> The atomic weapons testing program has been an important, some say vital, government function from its inception. Independent contractors were used only to aid the government to carry out its program. . . . It was neither arbitrary nor irrational for Congress to change the law so as to place putative [appellants] in the same position as any other party suing the United States in tort. See Hearings, supra, at 46-48; S.Rep. No. 500, supra, at 377. Moreover, there may be government compensation available to many of those injured by radiation, including [appellants] here, under veterans benefits legislation, 38 U.S.C. §§ 301-363, §§ 401-423 or the FECA." Hammond, 786 F.2d at 14. [quoting district court decision, 616 F. Supp. 759 (N.D. Cal. 1985)].

This is a fair and reasonable resolution of the problems presented by the unprecedented litigation against the atomic weapons contractors arising, as it does, from the vital assistance they have provided to our national defense effort.

In addition to these important policy reasons to oppose repeal of Section 1631, there is no scientific evidence to demonstrate a need for this legislation.

Radiation-Induced Cancer

As of June 1, 1986, 51 cases subject to Section 1631 had been filed, involving over 3,100 plaintiffs seeking over $8.5 billion. A large number of the plaintiffs were veterans who alleged that they were exposed to radiation in the course of their military service. These veterans are entitled to file claims for benefits under the laws administered by the Department of Veteran Affairs. In the administration of laws enacted for the benefit of veterans, the Department has traditionally resolved reasonable doubts in favor of veterans seeking benefits.

Recently, the Congress has created a new Court of Veterans' Appeals to review benefits decisions made by the Department of Veterans Affairs when internal appellate remedies have been exhausted, under the Veterans' Judicial Review Act, P.L. 100-687, 102 Stat. 4105 et seq. (1988). Moreover, the Congress, as I will explain later, has taken special action to ensure that radiation exposure claims are fairly considered by the Department of Veterans Affairs. Thus, the veterans seeking recoveries in suits subject to Section 1631 have available remedies to provide for their well being.

It is one of the tragedies of this litigation, however, that many veterans are unaware that it is very unlikely, in the extreme, that their cancers are in any way related to their military service. National Cancer Institute data indicate that approximately 930,000 people in the United States will be diagnosed as having cancer this year. If skin cancer is considered, too, the cancer diagnoses anticipated this year increase to nearly one and one-half million.[4] "About 73 million Americans now living will eventually have cancer; that is, about 30% of all Americans, according to present rates. Over the years, cancer will strike in approximately three out of four families."[5] Cancer is the second leading cause of death in the United States.[6]

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[4] American Cancer Society: 1986 CANCER FACTS & FIGURES, at 3. These estimates are based upon incidence rates from the National Cancer Institute SEER Program (1977-1981).

[5] Id.

[6] Id., at 5.

Although ionizing radiation is the most extensively studied human carcinogen,[7] it is a less significant cause of cancer when compared with other carcinogens -- the National Institutes of Health have determined that "[l]ess than 3% of the U.S. cancer burden can be . . . attributed to ionizing radiation from natural sources and human activities, compared to around 30% for tobacco smoking."[8] Of the ionizing radiation from natural sources and human activities, about 1.5% is attributable to atmospheric weapons tests (present testing by countries not signatory to the test ban treaty [India, China, France], and continuing fallout from the testing which occurred in the 1950s and 1960s).[9]

Our most definitive information about the health effects of radiation are derived from the Japanese atomic bomb survivors. These data show that among 63,035 atom bomb survivors who were exposed to high levels of radiation -- 100 or more rads -- there were 498 cancer deaths from 1950 to 1978, when only 323 deaths were expected -- a fifty-four percent increase.[10] But, among the

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7 D. SCHOTTENFELD and J. FRAUMENI, CANCER EPIDEMIOLOGY AND PREVENTION (1982), at 231.

8 NIH: "Report of the National Institutes of Health Ad Hoc Working Group to develop Radioepidemiological Tables," p. 13 (citing S. JABLON and J. BAILER, "The Contribution of Ionizing Radiation to Cancer Mortality in the United States." Preventive Medicine 9:219-222 (1980).

9 National Research Council: "The Effects on Populations of Exposure to Low Levels of Ionizing Radiation: 1980 (BIER III), at 99.

10 NIH, supra, at p. 13 (citing H. KATO and KW. SCHULL, "Studies of the Mortality of A-Bomb Survivors." Radiation Research 90:395-432 (1982)).

Japanese survivors who were exposed to low-level radiation -- less than nine rads -- fewer cancer deaths than the number which would normally be expected were observed.[11] Of course, virtually all the veterans who are plaintiffs in the lawsuits at issue were exposed to very low levels -- the vast majority in fact were exposed to less than one rad.

Between 1945 and 1962, about 203,000 military personnel and civilian employees of the Department of Defense participated in atmospheric nuclear weapons tests conducted at continental sites and in the Pacific Ocean.[12] The Department of Veterans Affairs has informed us that, based upon data received from the Department of Defense, the overwhelming majority of veterans received very low doses of radiation, whether they participated in the weapons tests or the occupation of Hiroshima and Nagasaki. For example, official film badge data for the test participants show fully 42% received no measurable dose whatsoever, and the average for the entire group was only .5 rem. To put these doses into perspective, it should be borne in mind that the average American sustains an annual dose-equivalent of .18 to .53 rems to the lungs per year from "natural background" sources (i.e., terrestrial and cosmic radiation and naturally occurring radionuclides deposited in the body).[13] Thus, the average test

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[11] Id.

[12] National Research Council: "Review of the Methods Used to Assign Radiation Doses to Service Personnel at Nuclear Weapons Tests" (1984), at 1.

[13] BIER III, Table III-4 (p.44).

participant's dose was only slightly more than he would have encountered from simply living on planet Earth for a year. When one considers that we also sustain average annual doses of some .103 rem to the bone marrow from medical and dental x-rays,[14] the relative insignificance of the doses from atomic activities may be better appreciated.

The doses for the occupation forces were even more negligible, given such historical factors as the limited activities of the personnel, the distance between the hypocenters of the detonations and where the servicemembers were stationed, the relatively short duty assignments in the cities, and the assignment of troops to the cities only after weeks had elapsed since the bombings. An absolute worst-case analysis by the Defense Nuclear Agency shows that no veteran's dose could have exceeded 1 rem as a result of this participation in the occupation of Hiroshima and Nagasaki. While the effects at high doses are well documented, the effects, if any, of the low doses sustained by most of these veterans are so few as to be undetectable.

The minimal effects of low dose exposure was explained in Johnston v. United States, 597 F. Supp. 374 (D. Kansas 1984). After hearing weeks of testimony in a suit which alleged that the four plaintiffs' cancers were caused by their exposure to radioactive aircraft parts, the court wrote an exhaustive, sixty page opinion, in which it concluded, inter alia, that:

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[14] BIER III, Table III-6 (p. 47).

> "There probably is, at least, a safe or practical threshold from exposure at about five rem per year, as a maximum permissible low dose (LET)." 597 F. Supp. at 377.

The opinion, which held for the government, demonstrates the difficulties of taking such cases to litigation.

Since 1977 the Department of Defense has committed nearly 150 man-years per year, at an annual expense of over six million dollars, in an effort to study the health effects among military personnel who were exposed to radiation during the atmospheric testing program.[15]

The two most significant conclusions of this study to date are:

First, of the doses estimated for the participants, "about 99% are smaller than the doses received by the personnel from natural and medical sources of ionizing radiation (about 5 rems in 30 years)."[16] The calculation of these doses were reviewed by a special committee convened by the National Research Council. The committee found that the estimations of external dose were "reasonably sound" and that the internal dose was probably overestimated.[17]

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[15] Defense Nuclear Agency: "Fact Sheet re: Nuclear Test Personnel Review" (April 3, 1984), p. 2.

[16] National Research Council: "Review of the Methods Used to Assign Radiation Doses to Service Personnel at Nuclear Weapons Tests" (1985), p. 25. Note: An individual notification and medical examination program for all individuals who received doses higher than 5 rad has been undertaken. Defense Nuclear Agency: "Fact Sheet," at 3-4.

[17] Id., at 2.

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Second, "when the data from all of the tests are considered, there is no consistent or statistically significant evidence for an increase in leukemia or other malignant disease in nuclear test participants."[18]

These two findings confirm the statement of Dr. Rosalyn Yalow, a Nobel Prize laureate in Medicine and Physiology, that the carcinogenic effect of low-level radiation, if any, ". . . is so minimal that epidemiologic studies cannot provide significant statistical data."[19]

Litigation Concerns

In the legislation enacted to date, Congress has demonstrated a marked preference for providing remedies that do not involve litigation for persons, particularly veterans, who assert that they have suffered injury due to exposure to radiation resulting from the Atomic Weapons Testing Program. See, e.g., Radiation-Exposed Veterans Compensation Act of 1988, P.L. 100-321, 102 Stat. 485-86; Veterans' Dioxin and Radiation Exposure Compensation Standards Act, P.L. 98-542, 98 Stat. 2725, et seq. (1984); Veterans' Health Care Amendments of 1983, P.L. 98-160, § 601, 97 Stat. 1006-1008; Veterans' Health Care, Training, and Small Business Loan Act of 1981, P.L. 97-72, §

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18 National Research Council, "Mortality of Nuclear Weapons Test Participants" (1985), p. 44.

19 R. YALOW, "Reply to K. Z. Morgan's Comments," Molecular Cell Biophysics 2:49-55 (1983).

102(a)(2), 95 Stat. 1047-1048. This is a sound course which should be continued.[20]

In passing the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Congress sought to ensure "a fair and balanced approach to resolving . . . compensation questions" (130 Cong. Rec. S6159 (daily ed. May 22, 1984) (remarks of Sen. Cranston)) by establishing a "general framework for the adjudication of exposure claims" (130 Cong. Rec. § 13592 (daily ed. Oct. 4, 1984) (remarks of Sen. Simpson)) in the VA benefits system.

This past year Congress went substantially further and enacted the Radiation-Exposed Veterans Compensation Act of 1988. This statute creates a presumption for veterans' benefits purposes that thirteen different cancers are "service-connected" whenever they manifest themselves in a veteran who participated in a radiation-risk activity.[21] Congress followed this course although it recognized that proof of causation, in any judicial sense, was problematic. As Senator Cranston explained:

> Science has clearly proven that ionizing radiation can produce serious adverse human health effects. While we do not have all the answers as to how much radiation exposure is necessary before the various adverse effects appear, there is a long list of cancers for which radiation has

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[20] In the Veterans' Judicial Review Act, discussed above, the Congress created the Court of Veterans Appeals to review veterans' benefit decisions.

[21] The Department of Veterans Affairs published the final implementing regulations for the statute on June 21, 1989. 54 Fed.Reg. 26027, et seq.

> been established as a risk factor. Unfortunately, we are not likely to have many more answers regarding the effects of the radiation exposure which these veterans received during their lifetime since the scientists have determined that a general morbidity study of them is not feasible. [134 Cong. Rec. S4638 (April 25, 1988).]

By taking this compassionate approach and giving the benefit of the doubt to veterans suffering from these thirteen diseases, Congress has assured them of a remedy. Enactment of S.982 would mean that their cases could be litigated against the contractors in spite of that remedy, and in spite of the sparse scientific record in support of any alleged causation. Radiation personal injury cases are much better suited to the administrative process than they are to expensive, time-consuming litigation.

As recently documented by the report of the Tort Policy Working Group on the causes, extent and policy implications of the crisis in insurance availability and affordability, the last decade has witnessed an extraordinary increase in tort liability in the United States. Not only have settlements, jury awards, and complex tort litigation case filings increased dramatically, but the courts in a few short years literally have swept aside centuries of limitations and conditions on tort liability which operated to ensure that tort law maintained a reasonable and workable balance between the need to encourage and facilitate economic growth and technological innovation on the one hand and the justifiable desire to compensate wrongfully injured persons on the other hand.

Accordingly, we are seeing a growing tendency by some courts to find defendants liable even where the defendant has done nothing wrong and may not even have caused plaintiff's injury. The results of this new tort liability are generating serious adverse effects for the United States economy, and are jeopardizing the long-term viability of many businesses and industries.

The problems of our tort system have been particularly serious for many government contractors, who the personal injury bar frequently perceives to be "deep pockets" that are easier to sue than the federal government. Consequently, there is a growing tendency by plaintiffs "aggrieved" by government activities to sue any involved contractors in lieu of, or in addition to, the federal government.

The atomic weapons contractors should not be caught up in this larger and troublesome litigation phenomenon. Prior to enactment of Section 1631 they were being sued not because they had done anything wrong, or caused any injuries, but because they were "deep pockets" who do not have the same defenses available to them as are available to the government under the Federal Tort Claims Act. The unfairness of this situation was readily apparent to the Congress when it enacted Section 1631.

At bottom, we believe that Section 1631 is a "statutory formulation of national policy" which reflects the "delicate, equitable balance between the interests of the United States

taxpayers and the alleged victims of nuclear radiation."[22] It is good legislation which should be preserved intact.

I appreciate the opportunity to present the Department's views on this legislation and will be glad to answer any of your questions.

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[22] H. Rept. 98-124, Part IV, at 4.

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

AUG 23 1989

Honorable Howell T. Heflin
Chairman, Subcommittee on Courts
and Administrative Practice
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to the follow-up questions posed by you and Senator Grassley at the close of my testimony on August 3, 1989 in opposition to S. 982, a bill that would repeal 42 U.S.C. § 2212. Our answer to each question is set forth below.

WHAT ROLE WILL DOJ TAKE IN THOSE SUITS? WILL YOU REQUIRE THAT ANY SETTLEMENT ENTERED INTO BY THE CONTRACTOR BE FIRST APPROVED BY DOJ?

If S. 982 were enacted, the Department of Justice would seek to provide guidance to the Department of Energy in the ensuing litigation. Even prior to enactment of 42 U.S.C. §2212, the Department of Justice occasionally undertook representation of Department of Energy (DOE) contractors in radiation litigation when it was clear that government interests would be furthered. If the Justice Department undertakes representation, Justice Department approval of any settlement will be required as a matter of course.

IF NOT, HOW WILL YOU BE ABLE TO PROTECT THE JUDGMENT FUND FROM UNWARRANTED JUDGMENTS?

It does not appear that the Judgment Fund itself would be jeopardized by enactment of S. 982. Rather, any adverse judgments against the contractors for which DOE is contractually obligated to provide indemnity would be funded by DOE's appropriations.

Absent statutory authority, agencies cannot agree to open-ended indemnification which is not limited to appropriated funds. The General Accounting Office has issued a series of decisions which reflect a sensible reading of principles emanating from the Anti-Deficiency Act which bar agencies from committing to pay indefinite or indeterminate obligations. See, e.g., Comptroller General Opinions B-201394 (April 23, 1981); B-201072 (May 3,

1982); B-201072 (May 12, 1983). Contractual provisions granting expanded indemnification in the absence of specific statutory authority are therefore invalid. Id. See also, California-Pacific Utilities Company v. United States, 194 Ct.Cl. 703 (1971); Anna Marie Frank v. United States, (9th Cir. No. 85-2205, filed June 20, 1986) (not-for-publication).

Most contract claims are, of course, paid from specific agency appropriations. In special circumstances, the Congress has, however, enacted legislation permitting agencies to authorize indemnification of contractors even when funds are not otherwise available. See, e.g., 10 U.S.C. § 2354 (Military Research and Development) and 50 U.S.C. § 1431-1435 (Public Law 85-804). DOE has authority to agree to such indemnification pursuant to 42 U.S.C. § 2210(h) and (j).

WON'T THERE BE AN IRRESISTIBLE URGE ON THE PART OF THE CONTRACTOR TO SETTLE, EVEN AT ANY PRICE? (to avoid bad publicity, problems with shareholders, etc.)

The DOE contractors may feel substantial pressure to settle radiation cases for the reasons you suggest. However, because the contractors who would be affected by S. 982 frequently have contracts providing for full indemnity of attorney fees and litigation costs, their counsel may advise the contractors to pursue every possible line of defense.

CAN THE JUSTICE DEPARTMENT "FORCE" THE CONTRACTORS TO DEFEND THEMSELVES?

The Department of Justice has no direct authority by which it can force the DOE contractors ~~to~~ defend themselves. The contracts themselves typically provide that the contractor "shall...defend litigation and claims in connection with this contract and may settle such litigation or claims with the prior approval of the contracting officer." Modification No. 24, Contract No. W-7405-ENG-48 between the Regents of the University of California and the Department of Energy.

IF NOT SETTLED, HOW LONG DO YOU ESTIMATE IT WILL TAKE TO LITIGATE THESE CASES, INCLUDING THE TIME SPENT ON APPEALS?

Radiation cases take much longer to prepare and try than do most other types of litigation. This is so because of the difficulties in establishing what levels of radiation the plaintiff may have been exposed to, the precise nature of the illness involved, and the complex, unfamiliar nature of expert testimony relating to causation and level of exposure. In Johnston v. United States, 597 F.Supp. 374 (D. Kansas 1984), which was relatively simple in that there was a small number of plaintiffs (four) who were allegedly exposed in one building, and there was no appeal, suit was filed in 1981 and resolved in

District Court at the end of 1984. Trial of that suit lasted many weeks and involved testimony by 53 witnesses and a transcript in excess of 5,400 pages. Id. at 375.

Even absent trial or substantial discovery these cases proceed slowly. The In re Consolidated United States Atmospheric Testing Litigation involved cases initiated in 1981, 1982 and 1983, but was not finally resolved until 1988. Thus, I would expect that a typical case would take more than five years to resolve.

HOW MANY CASES DO YOU THINK WOULD BE FILED, ONCE THE WARNER REPEAL IS IN EFFECT?

It is impossible to predict the number of cases which would be filed, but the potential is staggering. As Mr. Schiffer explained in his August 3 testimony, the likelihood is extremely small that any individual's cancer was caused by the nuclear testing program. However, there is a tremendous pool of potential claimants who could be easily persuaded that their cancer was caused by the tests and that, accordingly, they should invest in a lawsuit.

About 30% of all Americans will develop cancer, according to current rates.[1] Cancer is the second leading cause of death in the United States.[2] The potential pool of plaintiffs is massive. Between 1945 and 1962, about 203,000 military personnel and civilian employees of the Department of Defense participated in atmospheric nuclear weapons tests conducted at continental sites and in the Pacific Ocean.[3] It can be expected that 60,000 of these servicemen will develop cancer and become potential plaintiffs.

Likewise, at least 170,000 persons residing in southern Utah, northern Arizona and southeastern Nevada may have been exposed to fallout from atmospheric tests conducted at the Nevada

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[1] American Cancer Society: 1986 CANCER FACTS & FIGURES, at 3. These estimates are based upon incidence rates from the National Cancer Institute SEER Program (1977-1981).

[2] Id. at 5.

[3] National Research Council: "Review of the Methods Used to Assign Radiation Doses to Service Personnel at Nuclear Weapons Tests" (1984), at 1. This number does not include military personnel who did not directly participate in the tests but may have handled equipment that was used or otherwise been minimally exposed elsewhere.

Test Site.[4] Again, 30% of these people, or approximately 51,000 individuals, will develop cancer and become potential plaintiffs, as will 30% of the 250,000 to 500,000 people who have been employed at the Test Site itself.

Thus, the pool of potential plaintiffs directly affected by S. 982 includes at least 200,000 persons who were exposed to fallout and will suffer from cancer. If the courts will accept claims for "emotional distress," the number of potential plaintiffs could be considerably higher than this rough estimate of 200,000.[5]

There is also a large pool of potential radiation plaintiffs who are not covered by 42 U.S.C. § 2212 because their exposure to radiation was not incident to the atmospheric testing program. This group includes Uranium miners who numbered more than 10,000 in the 1970's alone.[6] It also includes the 240,000 military personnel who took part in the occupation of Hiroshima and Nagasaki.[7] The table attached to this letter provides an overview of these figures.

LAST CONGRESS, C.B.O. WAS UNABLE TO QUANTIFY THE COSTS TO THE GOVERNMENT FOR THIS BILL, OTHER THAN TO SAY THE COSTS WOULD BE "SIGNIFICANT." WHAT IS YOUR ESTIMATE OF THE COST TO THE GOVERNMENT, IN TERMS OF JUDGMENTS, SETTLEMENTS, LITIGATION COSTS, ETC?

Over the last ten years the Department of Justice has been involved in over two hundred radiation personal injury cases, a number of which proceeded to trial. None of these cases has resulted in a judgment in favor of the plaintiff. While a couple of nominal settlements have been consummated, we generally decline to settle any of these cases. This is in keeping with our view that the risks from levels of radiation typically involved are extremely low. Whether the contractors could achieve the same result as to judgments would remain to be seen. Likewise, I do not know whether they would resist settlements in

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[4] Report of the Interagency Task Force on Compensation for Radiation-Related Illnesses (Feb. 1, 1980).

[5] Fallout from the atmospheric tests was measurable in places far removed from the American West. For example, in 1951 fallout from one of the Ranger shots came down in Rochester, New York.

[6] Mine Safety & Health Administration statistics. No statistics for prior decades are readily available.

[7] Report of the Interagency Task Force on Compensation for Radiation-Related Illnesses (Feb. 1, 1980).

future, unknown circumstances. Certainly, however, we can expect that they would expend substantial sums of DOE funds in litigation costs, whether they ultimately won, lost, or settled.

The magnitude of these expenditures is indicated by a 1982 estimate of the General Counsel of the Regents of the University of California. Faced with eighteen (18) pending suits, he stated:

> Defense costs are becoming substantial. It is estimated that these costs will amount to approximately $20 million over the next three fiscal years.

If the University faced hundreds of suits it would presumably seek a proportionately greater amount, adjusted for inflation, just to cover its litigation costs, all to be funded by DOE.

WOULD THE DEPARTMENT NEED ADDITIONAL RESOURCES AND STAFF TO HANDLE THE INCREASE IN LITIGATION? CAN YOU ESTIMATE THE AMOUNT OF THIS INCREASE?

If the Department of Justice were to undertake to defend DOE contractors in all future litigation arising from S. 982, significant increases would be needed to staff the litigation.

Please feel free to call upon me if I can be of further assistance.

Sincerely,

Stuart E. Schiffer
Acting Assistant Attorney General

Enclosure

POOL OF POTENTIAL RADIATION PLAINTIFFS OTHER THAN GENERAL POPULATION

Exposed Population (estimates)	x	National Cancer Rate	=	Expected Cancers
Those affected by S. 982				
Military Test Participants				
203,000		30%		60,900
Downwind Residents of Utah, Nevada, Arizona				
170,000		30%		51,000
Test Site Employees				
250,000 to 500,000		30%		75,000 to 150,000
		TOTAL	=	186,900 to 261,900
Those not affected by S. 982				
Military personnel Exposed in Japan Occupation				
240,000		30%		72,000
Uranium miners				
10,000 (1970's)				
10,000 (1960's - estimated)				
10,000 (1950's - estimated)				
5,000 (1940's - estimated)				
35,000		30%		10,500
		TOTAL	=	82,500
Grand Total of Potential Plaintiffs (excludes "fear of cancer" and non-cancer claims)				269,400 to 344,400

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

SEP 1 1989

Honorable Howell T. Heflin
Chairman, Subcommittee on Courts
and Administrative Practice
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is a follow-up to my August 3, 1989, testimony and my August 23, 1989, letter regarding the Department's position on S. 982. We have now received the questions of Senator Thurmond. The Department's response to each of his questions is set forth below.

1. Mr. Schiffer, the Warner Amendment substitutes the United States for contractor defendants in radiation injury suits arising from the atomic weapons testing program. Once the United States has replaced the contractors as a defendant, it may then assert sovereign immunity as a defense which, in practice, ultimately thwarts any judicial remedy. Given this situation, what fair and equitable means of resolution are available to those who claim injury?

Numerous remedies are available to persons injured by the weapons testing program. Employees of contractors and Uranium miners have available to them remedies under state workers compensation systems. Government employees have remedies available pursuant to the Federal Employees Compensation Act. Military participants are eligible for veterans benefits. As discussed in my prepared statement and prior letter, these systems provide fair and equitable remedies to those persons who may have been injured by the weapons testing program. Also, the Federal Tort Claims Act is a fair means of resolving tort suits regardless of whether a particular putative plaintiff has a specific remedy.

2. In your prepared statement you remark that Section 1631 creates an exclusive remedy - a cause of action against the United States for injuries due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program. It is the opinion of many, based upon the principle of sovereign immunity, that this exclusive remedy has turned out to be no remedy at all. Could you please respond to this charge?

There is no basis to the charge that "this exclusive remedy has turned out to be no remedy at all" because there are numerous remedies available to persons who believe they were injured by the atomic weapons program. There are the remedies provided by state workers compensation systems, the veterans benefit system, and the Federal Employees Compensation Act. Moreover, there is a remedy provided by the Federal Tort Claims Act which is a balanced approach to government liability for injury caused by government employees or, pursuant to 42 U.S.C. § 2212, by those contractors which assisted the government in the atomic weapons testing program. The Federal Tort Claims Act provides a general waiver of the United States' sovereign immunity. The exceptions to that general waiver reflect the consensus that certain types of claims should not be actionable against the United States.

3. Mr. Schiffer, S. 982 would repeal Section 1631 of the Department of Defense Authorization Act of 1985 and simply restore to veterans and civilians a right to have their day in court. What are the perceived harms which would follow as a result of enacting this legislation?

Enactment of S. 982 would provide a strong pecuniary incentive to encourage ingenious pleading of cases alleging radiation-related injuries. The fact of the matter is that the United States was, of course, responsible for the Atmospheric Atomic Weapon Testing program. It is disingenuous, to say the least, to suggest that juries are appropriate forums to resolve issues that arise from national defense policy and foreign affairs priorities. At bottom, those cases have relatively little to do with the conduct of specific contractor personnel. The present law properly reflects the real circumstances of the testing program. Moreover, as I have also stated in my testimony and in my August 23, 1989 letter to you, enactment of S. 982 would encourage litigation on the part of very large categories of persons who have suffered illnesses which all credible evidence indicates are not caused by fallout from the atmospheric tests. Finally, it bears emphasis that the Congress has already enacted legislation providing a special regime for ensuring that veterans receive a remedy whenever there is any possibility, even a remote and unlikely possibility, that a veteran has a malady

arguably linked to exposure to low levels of radiation. My August 3, 1989 testimony and statement as well as my August 23, 1989 letter discuss these points more comprehensively.

4. The "Radiation Exposed Veterans Act" was enacted last year. This statute provides an administrative remedy which creates a presumption that 13 types of cancer are "service connected" whenever they manifest themselves in those veterans who participated in a radiation-risk activity. In your opinion, how has this administrative remedy worked out in practice?

As your question recognizes, the Radiation Exposed Veterans Act was only enacted last year. At this time, it is too early to tell how the administrative remedy has worked in practice. We do note, however, that the statute provides a presumption that certain kinds of maladies are "service connected" even when there is strong evidence that the maladies very probably are not "service connected."

5. Have you had the opportunity to examine the administrative remedy proposed by AT&T? If so, could you please comment on such an approach. If not, could you please review it in the near future and submit your comments to the Subcommittee?

We have reviewed the statements provided by the contractors. For the reasons we have previously stated, there is no basis to support any additional administrative remedies.

Contractor employees already have a workers' compensation remedy under state law for any occupational-related malady. Federal employees similarly have a remedy provided by the Federal Employees Compensation Act. Finally, as explained at some length in my August 3, 1989 statement, the Congress has enacted a series of statutes which create a no-fault remedy for veterans who might have been exposed to low level radiation incident to nuclear testing or to the occupation of Japan following World War II.

6. Assuming S. 982 was enacted into law, could you roughly estimate how many lawsuits would be filed as a result? What impact will these additional cases have on the judicial system?

Please refer to the attachments to our prior letter for an estimate of the number of potential litigants. Enactment of S. 982 plainly would encourage these potential litigants. Even if only a small fraction of the potential litigants actually filed suit, tens of thousands of lawsuits would inundate the judicial system within a short time. Each individual plaintiff's exposure would have to be separately determined and each individual plaintiff would have a right to a separate jury trial if S. 982

were enacted. Obviously, there would be a substantial disruptive impact on the judicial system if S.982 was enacted into law.

Please feel free to call upon me if I can be of further assistance.

Sincerely yours,

Stuart E. Schiffer

STUART E. SCHIFFER
Acting Assistant Attorney General

Senator HEFLIN. Did the Government at the time that they contracted with the defense contractors for this work, in that contract was there an indemnification provision which allowed the Government to have to reimburse the defense contractors for any tort liability?

Mr. SCHIFFER. Indeed, Mr. Chairman. From the outset, the arrangements have included indemnification provisions.

Senator HEFLIN. How much money would a repeal of the Warner amendment cost the Federal Government?

Mr. SCHIFFER. I don't have those numbers; I don't know if we can safely predict. Obviously, if suits were to be brought against contractors, claimants would still face the very great problem of proving causation. I mean, the simple but sad fact is that cancer is a vast national problem—30 percent of us are going to contract cancer in our lifetimes—the obligation the plaintiffs would still face would be to show causation. Now, we would at the same time be subject in these claims to what we all recognize to be the vagaries of our jury system, laws of differing States. In large measure the answer to your question is either going to be speculative, or it is going to await the results of jury trials.

Senator HEFLIN. Under some legislation pertaining to veterans, including the exposure to atomic testing as well as those marines, sailors, soldiers who went into Hiroshima and Nagasaki, there are presumptions of certain diseases in the Veterans' Administration now, passed by Congress, that it was service-connected, which raises an issue—if you were in the service and exposed to it, you have the Veterans' Administration, but a person outside, a civilian worker, I don't believe has any compensation procedure that is available to him. Is that correct?

Mr. SCHIFFER. I think that is largely correct. Certain civilians are clearly also going to be covered under statutory schemes—the Federal Employee Compensation Act, Workmen's Compensation—others may not. I think, however, that it is only fair to point out that Congress has traditionally seen fit to, if you will, enact an extra measure of compassion for veterans because of the sacrifices veterans have regularly been required to make.

The other problem, quite candidly, is that it is quite difficult to enact legislation which could be tailored to what we believe to be a truly small number of people who contracted cancer or related illnesses solely as a result of exposure to radiation, without simply cutting too broadly. The fact is that every scientific or epidemiological study that has been done in this area—and there have been many—have indicated that the vast majority, 99 percent, of those who were exposed to radiation were exposed at dosage levels which don't exceed our normal occupational exposure standards, levels at which there is no evidence of any greater incidence of cancer than is true in the general population.

The problem I see is in trying to deal broadly with people who may have been exposed to radiation but not cutting so broadly that you are spending hundreds of millions of dollars to compensate people who in truth did not contract any illnesses that they would not otherwise have fallen victim to.

Senator HEFLIN. Well, if legislation were to be recommended or passed which in effect prohibited the Federal Government from

claiming sovereign immunity under the discretionary governmental decisions, but kept it in the Federal Tort Claims Act, what would the Department of Justice position be on some proposal like that?

Mr. SCHIFFER. It would be a position of strenuous opposition. We believe, as I said, that the current regime is a fair regime; it is a regime that cuts across all segments of the population, and it is simply difficult to justify permitting a single category of damage claims against the United States to be litigated under statutory provisions more favorable to putative plaintiffs than is true of other classes of plaintiffs.

The discretionary function exemption has indeed been controversial over the years, but it does recognize the unique nature of governmental activities. The fact that the Tort Claims Act otherwise subjects the United States to liability under the laws of the 50 States in a fashion where private individuals might be liable is not always a statutory regime that can be fairly or properly applied to the United States.

That is a long-winded answer saying that we would be opposed.

Senator HEFLIN. Senator Grassley.

Senator GRASSLEY. I was also going to ask you, as Senator Heflin did, about cost. I think maybe I'll just quote a short part of a letter from a previous Congress that the Congressional Budget Office wrote on what was then S. 612, which said it could result in significant costs to the Federal Government for increased litigation, judgment and settlements. The amount of such costs is very uncertain, and we cannot estimate them. Then, skipping and quoting again:

> It appears that between 200,000 and 250,000 servicemen may have been exposed to radiation as a result of atomic weapons tests. This figure does not include civilian Government workers, employees of private contractors and civilians who may have been downwind of the atomic weapons tests.

Then, skipping again and quoting: "Currently, suits seeking approximately $2 billion from the Federal Government are pending or on appeal."

And then, last, "The Federal Government could incur substantial litigation costs both for indemnifying the private contractors for their legal costs and for increased court workload."

My first question is do you feel that it would take additional staff on the part of the Justice Department if this legislation were to pass?

Mr. SCHIFFER. In part it would depend on how we reacted. If the decision were made that the Department, since it was going to have to indemnify anyway, would personally defend the suits, it would require enormous additional staff. Otherwise we would simply be paying fees for private attorneys, which would also be substantial.

Senator GRASSLEY. I think, then, we ought to ask what role will DOJ take in those suits. Will you require that any settlement entered into by the contractor be first approved by DOJ?

Mr. SCHIFFER. I don't know that we have thought that far ahead. I don't know the exact wording of the indemnification agreements. It is something we would have to discuss if the time arose.

Senator GRASSLEY. I think you'd better have an answer for us on that before we get to a markup of this legislation.

Won't there be an irresistible urge on the part of the contractor to settle, even at any price?

Mr. SCHIFFER. There is always that problem when you have an indemnification clause, but I think the---

Senator GRASSLEY. Well, you know the issue about bad publicity and the problems with shareholders, et cetera.

Mr. SCHIFFER. Of course, that is one of our concerns about the very provision. We in fact do not think that the contractors should be subject to the divisive nature and difficulties of litigation brought against them for the responsibilities they assumed on behalf of the United States.

Senator GRASSLEY. Can the Justice Department force the contractors to defend themselves?

Mr. SCHIFFER. I think the indemnification agreements contemplate paying attorneys' fees as well as judgments, and therefore we would certainly have the option, I assume, to tell the contractors to defend the cases.

Senator GRASSLEY. If not settled, how long do you estimate it will take to litigate these cases, including the time spent on appeals?

Mr. SCHIFFER. I assume it could go on for years, Senator. I don't know how many years.

Senator GRASSLEY. OK. You don't have any track record in any other areas that you could refer to, maybe not right now, but for the record—if there is, I'd like to have you supply that.

Mr. SCHIFFER. I'd be happy to.

Senator GRASSLEY. How many cases do you think might be filed once the Warner repeal is in effect?

Mr. SCHIFFER. I guess we can only look back at the past. I don't have the exact numbers. We have supplied those in the past, and I'd be glad to. But it is going to be a substantial number of cases.

Senator GRASSLEY. I would ask that you supply them for the record.

Mr. SCHIFFER. I'd be glad to.

Senator GRASSLEY. Thank you, Mr. Chairman.

Senator HEFLIN. Thank you, sir.

Mr. SCHIFFER. Thank you.

Senator HEFLIN. The next panel is Pat Broudy, the Legislative Director, National Association of Radiation Survivors in Laguna Niguel, CA, and Prof. William Fletcher, professor of law, University of California at Berkeley. If you would come forward, we'd be delighted to hear from you.

Ms. Broudy, please go ahead.

Mr. JOHNS. Excuse me, Mr. Chairman.

I submitted sworn testimony this morning. I am attorney Larry Johns. I don't know whether Senator Reid's staff supplied that to the committee or not. I represent 220 test site workers.

Senator HEFLIN. I am sorry. We have a list of witnesses that have been selected. Your testimony will be submitted for the record, then.

Mr. JOHNS. Thank you.

[Prepared statement of Mr. Johns, along with supporting documents, follows:]

STATEMENT OF

LARRY C. JOHNS

CONCERNING S. 987

BEFORE THE UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

August 3, 1989

MR. CHAIRMAN and MEMBERS OF THE COMMITTEE:

MY NAME IS LARRY JOHNS. I AM A PARTNER IN THE LAW FIRM OF JOHNS & JOHNS, LTD., in LAS VEGAS, NEVADA. OUR FIRM REPRESENTS APPROXIMATELY 220 CIVILIAN EMPLOYEES WHO WORKED FOR GOVERNMENT CONTRACTORS AT THE NEVADA TEST SITE DURING THE 1950'S AND 1960'S AND WHO HAVE SINCE DEVELOPED OR DIED FROM A VARIETY OF CANCERS WHICH THEY CLAIM WERE CAUSED BY THEIR EXPOSURE TO RADIATION IN THE COURSE OF THEIR EMPLOYMENT.

I HAVE BEEN ASKED TO ADDRESS YOU IN BEHALF OF THE TEST SITE WORKERS AND OTHER VICTIMS OF THE NUCLEAR TESTING PROGRAM **WHO SUPPORT SENATE BILL 982, WHICH WOULD REPEAL THE WARNER AMENDMENT AND RESTORE THESE VICTIMS' RIGHT TO BRING ACTION AGAINST THOSE GOVERNMENT CONTRACTORS WHOSE NEGLIGENCE CAUSED CANCER AMONG THE EXPOSED**.

IN THE SHORT TIME ALLOWED, IT WOULD BE IMPOSSIBLE TO DISCUSS THE COMPLEX LITIGATION WHICH HAS ARISEN OUT OF THE EVENTS AT THE NEVADA TEST SITE DURING THE FIRST TWO DECADES OF TESTING. THEREFORE, I WILL FOCUS UPON THE CIRCUMSTANCES OF ONE CASE, **THE LEAD CASE, AMONG THE TEST SITE WORKERS; THAT OF MR. KEITH PRESCOTT WHO WORKED IN THE TUNNELS IN THE EARLY 1960'S WAS DIAGNOSED IN 1969 WITH MULTIPLE MYELOMA, A RARE CANCER OF THE BONE MARROW, AND WHO HAS BATTLED THE DISEASE FOR THE PAST TWENTY YEARS**. MR. PRESCOTT WOULD HAVE BEEN HERE, BUT UNFORTUNATELY IS IN ILL HEALTH FROM COMPLICATIONS OF HIS DISEASE. **HE ASKED ME TO URGE YOU TO REPEAL THE WARNER AMENDMENT**.

THE WARNER AMENDMENT HAS PARTICULAR SIGNIFICANCE TO MR. PRESCOTT. HIS CASE WAS THE FIRST OF THE 220 INDIVIDUAL CASES WE FILED IN FEDERAL DISTRICT COURT IN NEVADA. MR. PRESCOTT WAS EMPLOYED BY REYNOLDS ELECTRICAL & ENGINEERING COMPANY, THE GOVERNMENT'S PRIME CONTRACTOR AT THE NEVADA TEST SITE. IN THE FALL OF 1961, TESTING WAS RESUMED AT THE NEVADA TEST SITE IN TUNNELS, REQUIRING THE EMPLOYMENT OF MINERS AND OTHER SUPPORT PERSONNEL. **THE EARLY TUNNEL TESTS WERE DISASTROUS AS THE ATTACHED MEMORANDUM OF NOVEMBER 28, 1961 FROM BRIGADIER GENERAL BETTS TO AEC CHAIRMAN SEABORG DEMONSTRATES. THE MEMORANDUM ACKNOWLEDGES THAT 108 MINERS WHO WORKED IN THOSE CONTAMINATED TUNNELS IN THE FALL OF 1961, AS DID MR. PRESCOTT, WERE EXPOSED TO LEVELS OF RADIATION WHICH EXCEEDED THE ACCEPTABLE EXPOSURE STANDARDS.**

IN **1963**, WHILE **WORKING IN THE SAME TUNNEL WHERE THE 1961 OVEREXPOSURES OCCURRED, MR. PRESCOTT WAS INVOLVED IN A RECOVERY OPERATION AND WAS ORDERED BY HIS EMPLOYER REYNOLDS ELECTRICAL TO ENTER AND WORK IN A CONTAMINATED TUNNEL.** SOME OF THE CREWS WHO WERE EXPOSED IN THAT CONTAMINATED TUNNEL WERE MONITORED AND I**T WAS DISCOVERED THAT THE RADIATION DOSES TO THE THYROID GLAND WERE AS HIGH AS TEN TIMES THE PERMISSIBLE LEVEL.** MR. PRESCOTT AND HIS CO-WORKERS WERE ALLOWED TO DRINK BEER ON THE JOB IN ORDER TO FLUSH OUT THE RADIATION WHICH THEY RECEIVED IN THAT INCIDENT.

MR. PRESCOTT CONTINUED TO WORK IN THE TUNNELS AT THE TEST SITE UNTIL 1969 WHEN HE SOUGHT MEDICAL ATTENTION AND WAS DIAGNOSED WITH MULTIPLE MYELOMA. HE UNDERWENT TREATMENT AND HAS BEEN TOTALLY DISABLED SINCE.

ARMED WITH ACKNOWLEDGED NEGLIGENCE AND A DISABLING AND PAINFUL CANCER KNOWN TO BE CAUSED BY RADIATION, MR. PRESCOTT HAD REASON, BACK IN 1979 WHEN HIS LITIGATION AGAINST THE GOVERNMENT AND HIS EMPLOYER, REYNOLDS ELECTRICAL BEGAN, TO HOPE THAT HE MIGHT EXPECT A SPEEDY RESOLUTION OF HIS CLAIM. **THAT WAS TEN YEARS AGO**; TEN YEARS **FILLED ALTERNATELY WITH HOPE AND DESPAIR.**

IN 1980, SHORTLY AFTER HIS SUIT WAS FILED, THE GOVERNMENT AND REYNOLDS ELECTRICAL FILED MOTIONS TO DISMISS MR. PRESCOTT'S CLAIM CONTENDING THAT HIS EXCLUSIVE REMEDY WAS TO PURSUE A WORKERS COMPENSATION CLAIM UNDER NEVADA LAW. TO THE ASTONISHMENT OF THE TEST SITE WORKERS AND THE MORTIFICATION OF BOTH THE GOVERNMENT AND REYNOLDS ELECTRICAL, WE DISCOVERED THAT THE **AEC HAD ENTERED INTO AN AGREEMENT WITH NEVADA'S INDUSTRIAL COMMISSION BACK IN THE MID-1950'S UNDER WHICH NO INDUSTRIAL INSURANCE PREMIUMS WERE COLLECTED FROM REYNOLDS ELECTRICAL OR ANY OTHER TEST SITE CONTRACTORS TO PROVIDE A FUND IN ORDER TO COMPENSATE TEST SITE WORKERS FOR CANCERS THEY WOULD MOST CERTAINLY CONTRACT FROM BEING EXPOSED TO RADIATION.**

BOTH THE FEDERAL DISTRICT COURT JUDGE IN PRESCOTT v. UNITED STATES, 523 F. SUPP. 918 (D. NEV. 1981) AND THE NINTH CIRCUIT COURT OF APPEALS IN PRESCOTT v. UNITED STATES, 731 F.2d

1388 (9th CIR. 1984) RULED THAT BECAUSE WORKMANS COMPENSATION BENEFITS HAD BEEN ABROGATED BY THIS ILLEGAL CONTRACT, MR. PRESCOTT HAD THE RIGHT TO SUE BOTH HIS EMPLOYER, REYNOLDS ELECTRICAL, AND THE GOVERNMENT. THE LOWER COURT JUDGE AT PAGE 938 APTLY CHARACTERIZED THAT CONTRACT AS "A BLATANT ATTEMPT BY THE AEC TO AVOID THE NECESSITY OF PAYING, DIRECTLY OR INDIRECTLY, THE PREMIUMS ITS CONTRACTORS AND CONTRACTORS WERE REQUIRED TO PAY UNDER **N** (NEVADA'S) **O** (OCCUPATIONAL) **D** (DISEASE) **A** (ACT)."

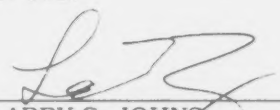
MR. PRESCOTT HAD REASON FOR HOPE IN THE FALL OF 1984. BUT BEFORE THE INK WAS DRY ON THE NINTH CIRCUIT'S DECISION (ENTERED IN SEPTEMBER 1984), THAT HOPE TURNED TO DESPAIR WHEN CONGRESS TACKED THE WARNER AMENDMENT ONTO THE 1984 DEFENSE APPROPRIATIONS ACT, THEREBY DEPRIVING MR. PRESCOTT OF HIS RIGHT TO A JURY TRIAL AGAINST REYNOLDS ELECTRICAL.

NEARLY FIVE YEARS HAVE PASSED SINCE THE WARNER AMENDMENT. REYNOLDS ELECTRICAL HAS BEEN SUBSTITUTED OUT AS A DEFENDANT. THE U. S. GOVERNMENT HAS FILED MOTIONS TO DISMISS, ARGUED BEFORE THE DISTRICT COURT JUDGE THIS PAST APRIL, CONTENDING THAT IT IS IMMUNE FROM SUIT UNDER THE DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT. THE GOVERNMENT'S POSITION IS THAT TEST SITE WORKERS, LIKE MR. PRESCOTT, HAD TO BE SACRIFICED IN THE INTEREST OF THE NUCLEAR TESTING PROGRAM. THE NET RESULT OF THE CONDUCT OF THE GOVERNMENT AND ITS PRIME CONTRACTOR, REYNOLDS ELECTRICAL, IS THAT **THESE TEST SITE WORKERS HAVE NO**

WORKMAN'S COMPENSATION BENEFITS, NO CAUSE OF ACTION AGAINST THEIR EMPLOYER WHO BLATANTLY AVOIDED NEVADA'S INDUSTRIAL INSURANCE REQUIREMENTS, AND A SEEMINGLY UNENDING BATTLE IN THE COURTS (TEN YEARS ALREADY) WITH NO EXPECTATION THAT THE CASES CAN BE RESOLVED IN THE FORSEEABLE FUTURE.

HAD IT NOT BEEN FOR THE WARNER AMENDMENT THERE IS A STRONG PROBABILITY THAT ALL OF THE TEST SITE CASES WOULD HAVE BEEN TRIED AND ALL APPEALS EXHAUSTED. DESERVING CLAIMANTS WOULD HAVE RECEIVED JUST COMPENSATION FOR THEIR LOSS.

IN BEHALF OF MR. PRESCOTT AND ALL OTHER RADIATION VICTIMS, I RESPECTFULLY URGE YOU TO RECOMMEND REPEAL OF THE WARNER AMENDMENT BY PASSAGE OF S. 982.



LARRY C. JOHNS
JOHNS & JOHNS, LTD.
323 LAS VEGAS BOULEVARD SO.
LAS VEGAS, NEVADA 89101
(702) 384-9797

[redacted]

UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON 25, D. C.

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MEMORANDUM FOR CHAIRMAN SEABORG
COMMISSIONER GRAHAM
COMMISSIONER HAWORTH
COMMISSIONER OLSON
COMMISSIONER WILSON

THROUGH GENERAL MANAGER →

SUBJECT: RADIATION EXPOSURE AT NTS TUNNELS "B" AND "E"

The purpose of this memorandum is to advise the Commission of the current LRL tunnel testing situation with specific reference to the difficulties which have resulted from the Antler shot [redacted] fired on September 15 -- the first underground nuclear detonation of the current test series) and the Chena shot [redacted] fired on October 10, 1961), the resultant personnel exposures, and the subsequent withdrawal of personnel on November 27, 1961, from the U12b and U12e tunnel complexes.

The LRL Underground Testing Capability at the Beginning of the Test Series. When the current test series resumed the only de facto capability the LRL had for underground testing existed in two tunnel complexes at NTS known as the U12b tunnel (2 shot sites) and the U12e tunnel (5 shot sites). LASL tests are conducted in deep underground holes. At the beginning of the current test series, 2 holes existed, 3 have now been expended and others are being drilled. Four new LRL tunnel complexes (known as G, I, J and K) are now being prepared.

The Loss of the U12e Tunnel. With regard to the U12e tunnel complex, the firing of the Antler shot resulted in loss of entry into the tunnel complex because of contamination and spread of debris throughout the side drift and the main tunnel. Specifically, the Commissioners will recall that approximately 10 minutes after the Antler shot a secondary explosion, caused by the generation of steam from water in the shot

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DY AUTHORITY OF Orders 202.1 & 202.1 dtd 11-1-61
BY [redacted] DATE 7-22-71
BY [redacted] DATE 7-22-71

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region, caused radioactive steam to enter the main tunnel with some escape from the portal. This secondary explosion has effectively eliminated to date the U12e tunnel complex as a firing site.

The Decontamination of the U12e Tunnel. Following the Antler shot, a program was commenced to decontaminate and rehabilitate the U12e complex so as to attempt to salvage remaining 4 shot locations which had been previously constructed. The decontamination proved to be very difficult because access to the tunnel walls was prohibited due to spread of debris and obstructions, such as ventilation pipes, cabling, etc.

Although the radiation levels inside the tunnel were high initially, for example, 22 roentgens (r) per hour at the portal, the tunnel has now been decontaminated to a point where the radiation at the portal is 15 milli-roentgens (mr) per hour, 100 mr per hour at 1000 feet, 200 mr per hour at 1500 feet, 300 mr per hour at 1700 ft. The U12e tunnel rehabilitation has now been accomplished to a point about 1800 feet from the portal. This recovery was accomplished in about 50 days at a cost of approximately $175,000. At this point, the tunnel is plugged by massive debris from the side drift where the Antler device was placed. It has been determined that rather than attempt to remove the debris plug, it should be by-passed and that work is now proceeding. Until we are able to complete the by-pass, we do not know whether in fact the remaining shot sites of the U12e tunnel can be used because we do not know the levels of radiation in the tunnel beyond the debris plug or the condition of the tunnel beyond that point. A recent drill hole into the latter portion of the tunnel indicated a level of 700 mr per hour to 1.5 r per hour but this possibly was influenced by radiation from the debris plug.

The Exposure in Tunnel U12e. As a result of the U12e tunnel decontamination effort, 22 underground workers had, as of November 15, 1961, accumulated external body exposures exceeding 3 rem per quarter. No one had accumulated whole body exposures exceeding 5 rem per year.

The Contamination of the U12b Tunnel Complex. With regard to the U12b tunnel complex, we have had a troublesome problem with regard to tritium in a portion of the tunnel. This problem arose from the Chena event (the Arrow device which was fired on October 10, 1961) and was complicated by the tritium residue remaining from the Evans event of Hardtack II. The Chena and Evans devices were fired within close proximity of each other.

The Determination that Tritium was in the U12b Tunnel and Subsequent Added Ventilation. Probably because of the low yield, the Chena device did not stem properly and gaseous fission products and tritium leaked into the main tunnel immediately after the detonation. Radioactive gaseous emissions into the tunnel precluded re-entry until 48 hours after the Chena detonation. Once the re-entry was made, radiation monitoring indicated fissuring between Chena ground zero, Evans ground zero and the main tunnel. Due to a combination of circumstances, gaseous fission products, and apparently tritiated water vapor, continued to seep through the fissures into the main tunnel for some time after the detonation.

Before the Chena event, as exposures of workers engaged in the decontamination procedures in the U12e tunnel approached 3 rem per quarter, they were transferred to the U12b tunnel to perform work in that complex. This procedure continued after the Chena firing. Although analysis of urine samples from two personnel in the re-entry team indicated the presence of a barely detectable level of tritium, concentrations of interfering gaseous fission product radioisotopes were large enough that standard air sampling techniques for tritium were virtually impossible for some time following the firing.

After the Chena event, a periodic urine analysis program showing intake and possible retention of tritium was established for all workmen entering the U12b tunnel complex. Computed radiation exposures from urine assay data exceeded those which had been predicted. Urine analyses continued to indicate higher retention rates than expected even though air sampling techniques were improved. Upon determination that air concentrations of tritium did exceed predicted levels, additional ventilation equipment was installed.

The Combined Exposure Due to Work in the U12b and U12e Tunnels. The combination of the external radiation whole body exposures in the U12e tunnel and the additional internal exposure in the U12b tunnel has resulted in 108 miners and supporting personnel receiving, as of November 24, 1961, a combined whole body exposure in excess of 3 rem in one quarter and of these 38 in excess of 5 rem in one year. No individual was exposed to more than 8.045 rem.

The NTS Radiation Criteria. The criteria for normal peacetime operations allow for exposures up to 12 rem per year (at a rate of 3 rem per quarter) provided such exposure does not exceed the formula (N-18) 5 rem, where N equals the man's age at his next birthday. Also, exposures in excess of 5 rem per year must be justified on the basis of necessity of an operation. With reference to criteria discussed above, it is believed that the exposures are well below amounts which would be considered significant to the health of the individuals.

UNCLASSIFIED

The Curtailment of Operations in the U12b and U12e Tunnels. Because of our inability to continue full scale tunnel operations within the normal established peacetime criteria, specifically a rate of 3 rem per quarter could not be exceeded regardless of whether the annual exposure was 5 rem or 12 rem, the U12b and U12e tunnel operations were curtailed on November 27, 1961. Underground workers who were approaching the 3 rem per quarter were removed from the tunnels, as well as any individuals who may have received a dosage of 3 rems per quarter.

The most difficult problem has arisen with regard to the U12b tunnel where essentially all key personnel have been exposed to the allowable quarterly limit. As a result, all mining personnel, including locomotive operators, have been pulled out of the tunnel. Essentially all work in that tunnel has been stopped. We at this moment have no indication when work can be resumed under the present radiation criteria. It should be pointed out that previous rotation of tunnel workers to attempt to keep within 3 rem per quarter has already brought about a potentially dangerous situation wherein serious accidents could occur within the tunnel because of rotation of individuals within crews.

Future Action. We are now in the process of assessing the effect of holding to the 3 rem per quarter in the U12b and U12e tunnels. There is no doubt that this will have a serious effect upon the Nougat schedule. In the very near future, we will make a recommendation to the Commission as to whether the radiation criteria should be revised for the current weapons test program or whether additional steps can be taken to continue operations under the current criteria and we are very doubtful of this latter possibility.

C. F. Anderson, Col.

A. W. Betts
for Brigadier General, USA
Director of Military Application

Health Physics Pergamon Press 1964. Vol 10, pp. 1123–1127. Printed in Northern Ireland

MONITORING OF SEVERAL INDIVIDUALS EXPOSED TO MIXED FISSION PRODUCT GASES AT NTS

J. A. ECKERT
Southwestern Radiological Health Laboratory, U.S.P.H.S., Las Vegas, Nevada

(*Read by title*)

Abstract—On June 6, 1963, several men working at the Nevada Test Site were accidentally exposed to fission product gases in a tunnel. The men were subsequently monitored using a 3 in. × 3 in. NaI collimated crystal and a multichannel analyzer. A phantom was constructed and the assembly was calibrated with several isotopes, the results being used in an extrapolation to find the efficiencies for ^{133}I and ^{135}I. Over 100 spectra were recorded, tracing the history of ^{131}I, ^{133}I and ^{135}I from 8 hr after exposure to two weeks. Activity to dose conversion factors were developed for the various isotopes of iodine and dose estimates were calculated for the exposed individuals. These same dose conversion factors have been applied to predicted iodine ratios from the fission of ^{235}U and an estimate of activity-dose conversion factor vs. time of gas release has been made.

INTRODUCTION

At approximately 9.00 a.m., June 6, 1963, a representative of Reynolds Electrical and Engineering Company, Inc. (REECo.), prime contractor at the Nevada Test Site called the Southwestern Radiological Health Laboratory (SWRHL) of the U.S. Public Health Service to request the Laboratory's assistance with emergency radiation monitoring of thirteen men accidentally exposed to fission product gases in a tunnel at NTS. The gases were the product of an underground nuclear detonation at 10.00 a.m., June 5, 1963.

The equipment available for assessing exposure consisted of a sealed 3 in. × 3 in. photomultiplier—NaI crystal assembly fitted into a flat field collimator similar to that used in routine medical thyroid studies. The collimator was directed toward a large, shielded enclosure to reduce background. The assembly was connected to a 400-channel analyzer with integrator-resolver, tape output and input, and x–y plotter accessories.

The subjects were counted with the collimator pointed at the thyroid, the abdomen, and the thigh. A "Cutie Pie" dosimeter with beta shield closed was also used to determine dose rate at the skin surface over the thyroid. Cutie Pie results are shown in Fig. 1. Thyroid measurements with the collimator-crystal assembly were first made 12 in. from the thyroid (with the thyroid 17 in. from the crystal face).

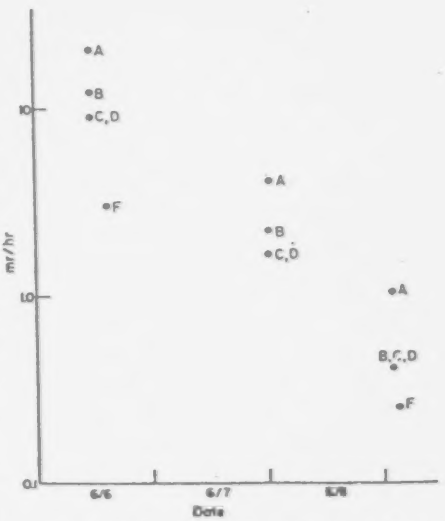


Fig. 1. Dose rate at skin surface over thyroid measured with a "Cutie Pie."

This distance was made necessary by large values for dead time, which in early counts was as high as 90 per cent at normal counting distances. However, after the first week of measurements, the distance could be reduced to 2.5 in. No appreciable changes in dose rates were observed after showering and clothing changes. Because of his availability, Subject F was counted several times the first day and then once each day for an entire week. He was counted again two weeks after the exposure.

Calibration

Two phantoms were used to calibrate the assembly. A rice-filled phantom provided by Dr. HOWARD ANDREWS of the National Institutes of Health was used to calibrate for ^{131}I. A paraffin neck-phantom was used in calibrating for ^{133}I and ^{135}I. Since standard solutions of ^{133}I and ^{135}I were not available, calibration factors for several different isotopes were interpolated to obtain the efficiency for counting ^{133}I and ^{135}I. The peak efficiency for ^{133}I was obtained by interpolation between peak efficiencies for ^{137}Cs and ^{131}I; ^{135}I presented a much more complex problem, and the method finally used depended on the similarity between the 1.4 MeV (37 per cent) and 1.28 MeV (34 per cent) peaks of ^{135}I, and the 1.17 MeV and 1.33 MeV peaks of ^{60}Co. The combined peaks of ^{136}I were assigned a 35.5 per cent abundance when compared to those of ^{60}Co.

Activity-to-dose conversion values

The dose conversion values (see Table 1) used in this report are based on data from ICRP II[1] and a simple one-compartment model with a biological half-time of 5 hr for thyroid uptake. The exchange between lungs and the blood stream was assumed to be instantaneous. The conversion factors are based on iodine actually in a 20 g thyroid extrapolated to the time of injection.

Table 1. Activity-to-dose conversion factors for isotopes of iodine. Activities extrapolated to time of exposure

Isotope	Conversion factor (Rad/μc)
^{131}I	6.85
^{132}I	0.062
^{133}I	1.18
^{134}I	0.0165
^{135}I	0.27

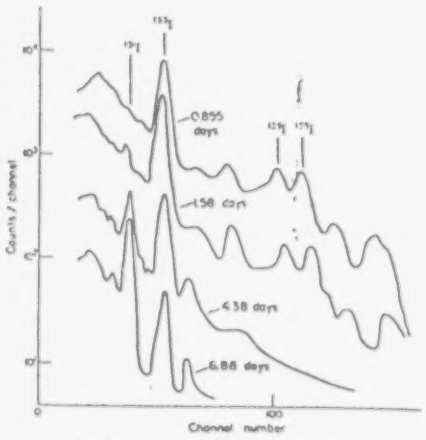


FIG. 2. Typical spectra observed on thyroid of Subject F.

RESULTS

One-hundred and sixty-five spectra were obtained between June 6, 1963 and June 21, 1963. About 20 early spectra were rejected because of poor resolution due to a ground loop in the counting system. About 50 spectra were calibrations and establishment of backgrounds. Figure 2 shows four typical spectra observed from the thyroid of Subject F. A detailed early spectrum from Subject F is shown in Fig. 3. Note that peaks from the tellurium precursors and xenon daughter products were not observed. Evidence of ^{133}Xe can be found in an early thigh spectrum. It is possible that some ^{132}I is present in this spectrum since it could be masked by the other isotopes; however, the quantities of ^{132}I would necessarily have to be quite small. The ^{132}I activity-to-dose conversion factor is small and the contribution of ^{132}I to the total integrated dose would be insignificant. Figure 4 shows the activity in the energy region 0.46–0.60 MeV which represents the peak region of the ^{133}I. Iodine-133 in the thyroid of Subject F showed an effective half life of 0.83 days which is in fairly close agreement with the value of ICRP II[1] (0.87 days).

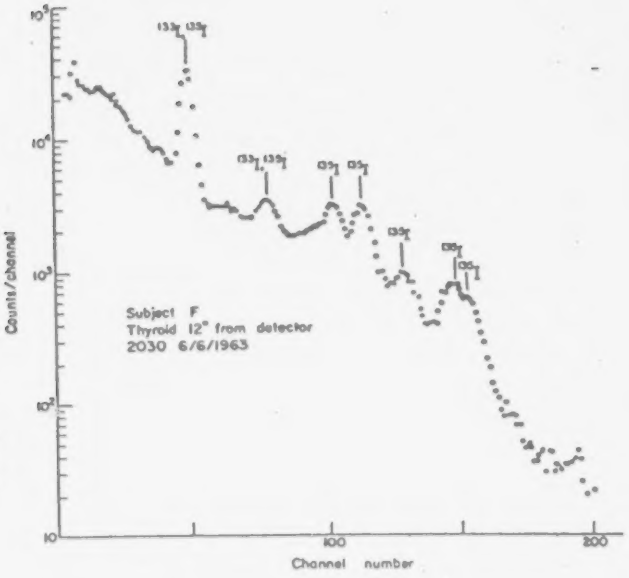


FIG. 3. Detailed early thyroid spectra on Subject F. (Note the absence of either tellurium or xenon peaks.)

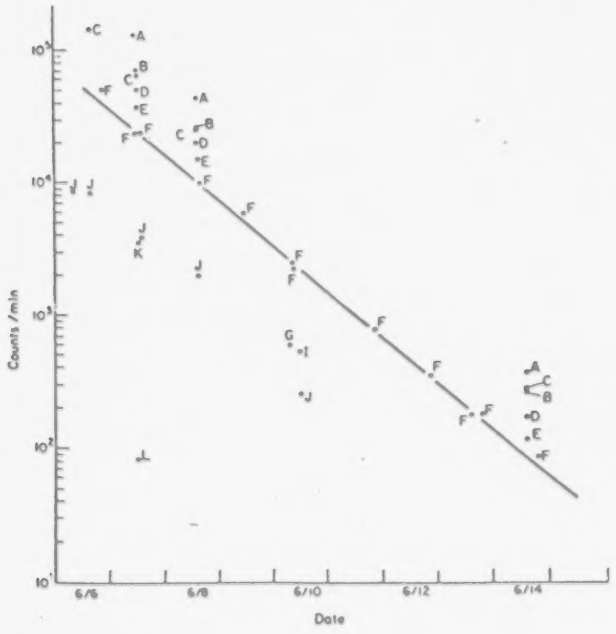


FIG. 4. Activity in the 0.53 MeV photopeak region of ^{133}I (0.46–0.60 MeV).

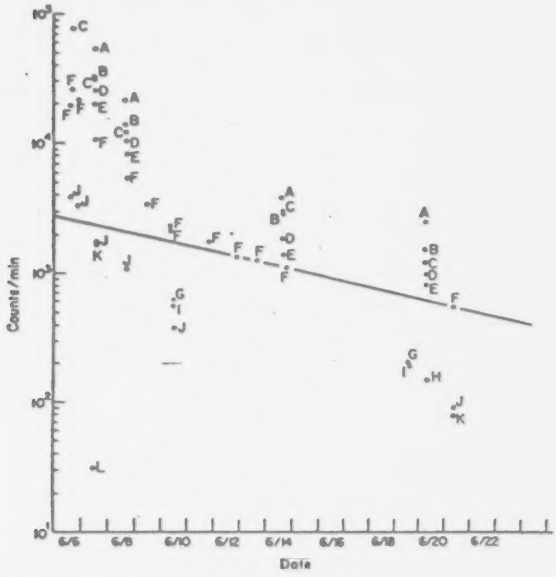
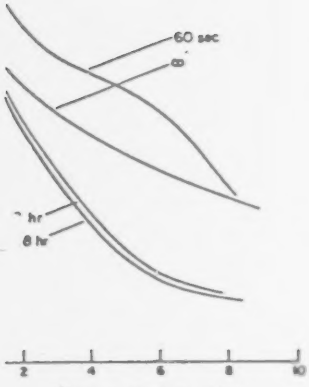


FIG. 5. Acitivity in the 0.364 MeV photopeak region of ^{131}I (0.30-0.40 MeV).

Table 2. Iodine burdens in the thyroid and calculated total doses

Subject	Duration of exposure (hr)	Thyroid burden in μc			Total dose in rads	Remarks
		^{131}I	^{133}I	^{135}I		
A	3	4.45	226	1112	593	No respirator
B	3	2.78	138	690	371	No respirator
C	¾	2.62	131	654	350	No respirator
D	3	1.99	99.5	497	265	No respirator
E	4	1.50	75	375	200	No respirator
F	2½	1	50	250	133	Respirator on for 5 min.
G		0.280	14	70	37	No respirator
H	3	0.270	13.5	67.4	36	Respirator on for 30 min.
I		0.251	12.6	62.7	34	No respirator
J	3	0.161	8.05	40.2	21	Respirator part of time
K	¾	0.150	7.50	37.5	20	Respirator entire time
L	1½	0.012	0.600	3	1½	Left area before release



ıe conversion factors from predicted
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figure for thyroid burden was based
lated burden from Subject F and the
vities of the other subjects based on
5. The ratios of abundance of the
cs based on ^{131}I as 1 were: ^{131}I—1,
ıd ^{135}I—250. These estimates are
e activities extrapolated to the time
and are derived from the averages
s shown in Figs. 4 and 5, assuming
ɔjects were exposed to identical gas

.stimates for iodine burden in the thyroid and the calculated total dose are found in Table 2. Table 2 also shows the estimated duration of exposures and remarks regarding the use of respirators by some of the subjects.

Predicted dose conversion factor

The activity to dose conversion factors (see Table 1) were applied to the predicted values for a relative abundance of isotopes of iodine from the fission of ^{235}U by BOLLES and BALLOU.[2] Figure 6 shows the dose conversion factor vs. day of exposure for precursor buildup from 60 sec until the actual time of exposure. The exposure is assumed to be instantaneous.

DISCUSSION

Determination of rather low dosages of short-lived isotopes of iodine can be made with very modest equipment and a minimum amount of shielding. Some difficulty is encountered in attempting to calibrate for the short-lived isotopes, particularly ^{135}I. Strontium-85 standards are now readily available and could be used for the ^{133}I calibration. In view of the methods of calibrating used in this study (particularly the use of ^{60}Co in calibrating for ^{135}I), an uncertainty factor of ± 30 per cent is assigned to the results. Dose conversion factors were not available in the literature at the time of the incident and initial estimates which neglected the 5 hr half time for uptake were significantly different from the values appearing in this report for the shorter lived isotopes (^{133}I and ^{135}I). The predicted dose conversion factors graph is included, not because of any utility in predicting dose conversion factors, but to show the extreme range of values that can occur by varying the precursor buildup time.

Acknowledgments—The author wishes to thank Dr. HOWARD ANDREWS of the National Institutes of Health and C. B. KINCAID of the Rockville Radiological Health Laboratory for their assistance in obtaining standards, and P. N. LEE, Southwestern Radiological Health Laboratory, for his assistance in obtaining and analyzing the data. JOSEPH PROTHRO, Southwestern Radiological Health Laboratory, computed the predicted dose conversion factors.

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1. *Report of ICRP Committee II on Permissible Dose of Internal Radiation* (1959), *Health Phys.* 3, 1 (1960).
2. R. C. BOLLES and N. E. BALLOU, National Radiological Defense Laboratory, USNRDL-456 (1956).

Senator HEFLIN. Go ahead, Ms. Broudy.

PANEL CONSISTING OF PAT BROUDY, LEGISLATIVE DIRECTOR, NATIONAL ASSOCIATION OF RADIATION SURVIVORS, LAGUNA NIGUEL, CA; AND WILLIAM FLETCHER, PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA, BERKELEY, CA

STATEMENT OF MS. BROUDY

Ms. BROUDY. Mr. Chairman and members of the committee, as legislative director of the National Association of Radiation Survivors, an organization formed for the purpose of obtaining justice for all radiation victims, I have been requested to provide testimony to this subcommittee with regard to the introduction of S. 982 which, if implemented, would repeal 42 U.S.C., section 2212, Warner.

We do not feel that the repeal of Warner will correct all of the injustices dealt to our radiation victims. Not until we have a reexamination of the sovereign immunity, narrowing of the discretionary function exception to the Federal Tort Claims Act, a reduction to its original intent of the Feres doctrine, repeal of the contractor immunity defense, and any other exceptions to the FTCA that impair and impede our constitutional rights will our citizens be free of governmental control of our lives—a right we fought for over 200 years ago.

Certain of the members of our organization and others have been directly affected by the adoption of Warner. I refer to plaintiffs in the following cases: *Prescott* v. *Reynolds Electric*, the *Baneberry* case, *Konizeski* v. *Livermore Labs*, Consolidated Cases, as examples.

The Government moved pursuant to Warner to be substituted for the contractors as defendant in these cases. By this tactic, the cases were then remanded to the Federal District Court. The results of this maneuver then accomplished the dismissal of the Consolidated Cases. The *Prescott* and *Baneberry* cases were heard in the District Court in Nevada on April 13, 1989. A motion to dismiss on the grounds of the discretionary function has been filed by the Government. No decision has been rendered at this time.

The Consolidated Cases were then appealed to the United States Court of Appeals for the Ninth Circuit in San Francisco. At this point, *Alice P. Broudy, et al.*, v. *United States of America* was joined with the Consolidated Cases, and the Consolidated Cases were dismissed and appealed to the Supreme Court, which denied certiorari.

In *Allen* v. *United States*, a class action filed by downwind residents of the Nevada test site exposed to fallout in the 1950's, a judgment was rendered for 11 of the class. The Government claimed it did not know the dangers of radiation at that time. It appealed that decision to the 10th Circuit Court of Appeals, and the 10th reversed the district, and the matter was dismissed on the grounds of discretionary function exception. This case, too, was appealed to the Supreme Court, which again denied certiorari.

In the consolidated cases, the Government stated it knew the dangers of radiation since the 1940's. In the *Allen* case, it did not know the dangers of radiation in the 1950's.

There are numerous other radiation victims, neighbors of the manufacturers of nuclear weapons, that is, Hanford Washington which from 1955 to 1980 released 1 million curies in all of Washington and Oregon; the Savannah River. South Carolina reactor, which is operated by the Department of Energy and has no safety oversight by the Nuclear Regulatory Commission; National Lead of Ohio, Fernald, OH, which spewed thousands of pounds of uranium dust over the nearby countryside; and Rocky Flats, CO, which is currently undergoing a criminal investigation by the FBI.

During the 1940's, 1950's and early 1960's, 250,000 servicemen were deliberately exposed to radiation by placing them in the near vicinity of nuclear bomb explosions in both the Pacific and in Nevada.

Our Government has made settlements with the Three-Mile Islanders; residents near National Lead, Fernald, OH; property owners nears the Rocky Flats, CO plutonium plant; and to residents of the Marshall Islands, amongst others. There have been no settlements with Hanford neighbors; test site workers; lab workers; uranium miners; and all other victims of nuclear testing.

On May 24, 1988, after approximately 10 years of hearings in both Houses of Congress, then President Reagan signed Public Law 100-321, the Radiation-Exposed Veterans Compensation Act of 1988, a bill to compensate certain veterans with certain cancers and widows of deceased veterans through the Veterans' Administration, their long overdue service-connected disability pensions.

Our Government is select in its award of settlement moneys to some radiation victims, while fighting in the courts the award of token amounts to others. It has spent millions defending the cover-up over the years, only to finally admit in the past few years——

Senator HEFLIN. Will you please summarize in a minute, ma'am?

Ms. BROUDY [continuing]. Yes; I will—the dangers surrounding nuclear bomb factories. Does Warner, discretionary function, contractor immunity, Feres, et cetera, only apply to the victims of the nuclear testing era? Is our Government afraid that if settlements are made to the victims of nuclear testing, that would be an admission that testing is hazardous to our health and that therefore a much larger hue and cry would result, which would make the continued testing of bombs, albeit underground, more controversial, necessitating negotiations with the Soviets?

Is this why then President Reagan signed a Veterans' Administration bill at 4:30 o'clock on Friday, with no press and no fanfare? At the time of signing Public Law 100-321, Mr. Reagan stated that the bill was not an admission of the dangers of nuclear testing; it was only to recognize the special services this select group of veterans had performed.

The American people need answers to the foregoing questions. And I would like to state that the proposed legislation by AT&T and the University of California has been categorically rejected by our organization.

I would like to express our appreciation for the opportunity to express our views with regard to this very important subject.

Senator HEFLIN. Thank you, ma'am.

[Prepared statement of Ms. Broudy and additional material for the record follow:]

STATEMENT OF PAT BROUDY, LEGISLATIVE DIRECTOR

OF

THE NATIONAL ASSOCIATION OF RADIATION SURVIVORS

BEFORE THE

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE

OF THE

SENATE JUDICIARY COMMITTEE

August 3, 1989

Pat Broudy
Legislative Director
33492 Periwinkle Drive
Monarch Beach, CA 92677

NATIONAL ASSOCIATION OF
RADIATION SURVIVORS

Mr. Chairman and Members of the Committee:

As Legislative Director of the National Association of Radiation Survivors, I have been requested to provide testimony to this Subcommittee with regard to the introduction of S. 982, which, if implemented, would repeal a provision of the Federal Tort Claims (FTCA) Act relating to the civil liability of government contractors for certain injuries, losses of property, and deaths, the short title of which is: RADIATION VICTIMS FAIR TREATMENT ACT.

PURPOSE

The National Association of Radiation Survivors (NARS) was established approximately six years ago to form an umbrella group to aid and educate all victims of radiation exposure. In addition, our goal is to obtain justice for these victims via legislation, and if necessary, litigation. We have accomplished much in this regard, but there is much more to be done.

EFFECTS OF SECTION 2212 (WARNER)

Certain of the members of our organization, and others, have been directly affected by the adoption of Section 1631 of the Department of Energy National Security and Military Applications

of Nuclear Energy Authorization Act of 1985, codified at 42 U.S.C. Section 2212 (Warner), which in effect foreclosed their Constitutional rights to a fair trial. As an example, Prescott vs REECO, and DOE., was filed in U.S. District Court in 1980 alleging negligence and requesting punitive damages of Reynolds Electrical & Engineering Company (REECO), a test site contractor, in the amount of $100 million. Under Warner, the government was substituted as defendant for the contractor. Prescott also sued the government for $1.5 million for pain and suffering from multiple myeloma, a disease that destroys bone marrow. (Multiple myeloma is one of the 13 cancers for which VA compensation was awarded in S.100-321 hereinafter described.) The Prescott case is a Utah case, and the "Baneberry" case, which is a Nevada case filed about 10 years ago, were in the litigation process at the time of the adoption of Warner. The Baneberry case was a result of exposure to nuclear materials when an underground nuclear explosion blasted into the air on December 18, 1970, exposing 900 workers to radiation. The suit was filed by two Nevada Test Site workers who sued the government; Security guard Harley Roberts and electrician William Nunnamaker. Both of these cases are now in the Federal District Court in Nevada where a hearing was held April 13, 1989. A motion to dismiss on the grounds of the discretionary function has been made by the government. No decision has come down as yet.

The government moved pursuant to Warner to be substituted for the contractors as defendant in Konizeski, et al., Plaintiffs, vs.

Livermore Labs, et al., (Consolidated Cases) and the contractors, including AT&T, REECO and the University of California, joined in that motion. That case had previously been filed against contractors who had manufactured the nuclear bombs, in the Superior Court of the State of California. By this tactic, the Consolidated Cases were then remanded to the Federal District Court, which meant, among other things, that the plaintiffs would not be afforded a jury trial. In addition they would be subject to the same restrictions which they had been trying to avoid by filing their lawsuits against the contractors in the state courts rather than against the U.S. Government in the federal courts, i.e., Feres, discretionary function, contractor immunity and the foreign country exception, in addition to Warner. Some of the plaintiffs in this action were veterans and some of them were civilians. There were 43 plaintiffs in all.

The results of this bait-and-switch were:

1. The contractors were dismissed from the actions.

2. The actions were dismissed under the discretionary function exception.

3. In addition, the claims brought by or on behalf of servicemen were dismissed on the alternative ground of the Feres doctrine.

4. The claims based on government conduct that occurred at Hiroshima, Nagasaki, the Marshall Islands, or Christmas Island

were dismissed on the alternative ground of the foreign country exception.

The Consolidated Cases were then appealed to the United States Court of Appeals for the Ninth Circuit in San Francisco, California.

At this point Alice P. Broudy, et al., vs. United States of America was consolidated with the Consolidated Cases. This is a case of a widow of a marine who died of cancer of the lymph nodes and who sued the government, alleging that the government should have warned her husband post-discharge of the dangers of radiation so that he could seek treatment and possibly avoid an untimely death by cancer. The complaint contended that the government did not know the dangers of radiation until after Major Broudy's retirement from the marine corps in 1960. (This to circumvent the Feres doctrine.) The case was filed in 1978, dismissed twice by the Federal District Court in Los Angeles; appealed to the Ninth Circuit Court in San Francisco which reversed the District Court's decisions, and was in the process of discovery at the District Court when the government moved for a summary judgment on the grounds that they now knew that they had known since the early '40s the dangers of radiation, hence this was now a continuing tort since the knowledge began before Major Broudy's discharge and which would put us back under the Feres doctrine. So the case was dismissed because of Feres and the discretionary function exception. We again appealed to the Ninth Circuit and it was at

that time that we became one of the Consolidated Cases.

During the hearing at the Ninth Circuit, a Justice Department attorney, Marc Johnston, made the following statement: "The government has known since the early '40s the dangers of radiation; that it could cause cancers and birth defects, but felt that it was for the good of the country to sacrifice a few men." One of those men was my husband. There is no transcript of this proceeding as the tapes were erased. Mr. Johnston was representing my government, and my government was telling me that my husband was no better than the animals sacrificed during the nuclear tests. The Consolidated Cases were dismissed.

A petition for rehearing and suggestion for en banc consideration was filed and denied.

The Consolidated Cases were appealed December 8, 1987 to the Supreme Court which denied certiorari.

What is so particularly ironic is that in the Allen vs. United States case the government claimed it did not know the dangers of radiation during the '50s when the bombs were tested in Nevada in the atmosphere, thereby releasing fallout which contaminated the "downwinders" -- those living downwind of the test site. There was a class action suit filed by that community which resulted in a partial judgment for 11 of the class. The government appealed that decision to the Tenth Circuit Court of Appeals, and approximately three years later the Tenth reversed the District

Court and dismissed the case on the grounds of the discretionary function exception. The matter was appealed to the Supreme Court which again denied certiorari.

Our government speaks out of both sides of its mouth -- in the Consolidated Cases the government knew the dangers of radiation since the 1940s. In the Allen case it did not know the dangers of radiation in the 1950s.

ADDITIONAL RADIATION VICTIMS

We now know, because of information recently made public, that in addition to the victims mentioned above, there are numerous other radiation victims -- those who live in the vicinity of the manufacturers of nuclear weapons and triggers for those weapons, i.e., Rocky Flats, Colorado; Fernald, Ohio; Savannah River, South Carolina and Hanford, Washington, to name a few. With regard to radiation releases, the following statistics are relevant to this proposed legislation, in that there will assuredly be more litigation in the future from the newly discovered "downwinders" in the vicinity of the bomb factories.

Three Mile Island released 30 curies of radiation.

Hanford, from 1955 to 1980 released one million curies in all of Washington and Oregon. This information was just recently released under the Freedom of Information Act -- 17,000 pages of classified information. Hanford is identical to Chernobyl,

manufactures plutonium and is not subject to the same regulations that apply to commercial power reactors.

The Savannah River Reactor is operated by the Department of Energy and has no safety oversight by the Nuclear Regulatory Commission.

National Lead of Ohio, Inc., Fernald, Ohio made uranium ingots and rods at the Fernald foundry from 1951 to 1985 for use in the fuel rods of reactors that produce key nuclear weapons ingredients. DOE-officials acknowledge that in the process, the foundry spewed thousands of pounds of uranium dust over the nearby country side and deposited radioactive and industrial wastes in leaking pits, that will be cleaned up at an estimated cost of $1 billion over the next six years.

Rocky Flats, a manufacturer of plutonium triggers for nuclear bombs, owned by the U.S. Department of Energy, and operated by Rockwell International Corp., is currently undergoing a criminal investigation by the FBI. Experts state that the numbers of brain cancers is two to four times more prevalent among Rocky Flats workers than in the average population. In June of 1957, there was an unexplained explosion at the plant wherein two workers were injured. This was followed by more accidents, leaks and unsafe disposal of its waste. 1400 barrels of radioactive waste were buried near a main road at the plant in 1958.

In addition to the above, during Operation Redwing in 1956,

detonated in Nevada, during four months after detonation, May to August 1956, radiation levels were 168 percent above background in Nevada and 85 percent above background in Fresno, California. The University of California monitored this test and the results were just released recently.

And then, of course, the military guinea pigs -- the 250,000 servicemen deliberately exposed to radiation, to test their psychological reactions from 1946 in the Pacific to 1951 when testing commenced in Nevada, to 1962 when the Atmospheric Test Ban Treaty was signed. Some years after their exposure some of these servicemen developed many types of cancers and other radiogenic abnormalities. In addition many of them became sterile either temporarily or permanently. The government had steadfastly denied knowledge of the dangers of radiation but it wasn't until November of 1985 when it filed its Memorandum in Support of Defendants' Motion for Summary Judgment in the matter of Broudy v. United States that the full horror story of just exactly how much it did know became public when it sought to have that lawsuit dismissed. Since the Motion is too lengthy to quote in its entirety I will quote only a few passages:

"...Later when the decay reduced the gamma radiation to safe levels you would be subject to dangerous hazards in this same area. This would not be lethal in the sense of being immediately dangerous. There is a potential and actual absorption hazard. You need only to absorb a few micrograms of plutonium and other long-life fission materials, and then know that you are going to develop a progressive anemia or a tumor in from 5 to 15 years. This is an insidious hazard and an insidious lethal effect hard to guard against.

"Included in this category are, among other effects:

"1. Nephrosclerosis and related hypertension produced essentially by the relatively direct damaging effects of radiation on cells in the kidneys...

"2. Cataract formation...

"3. Decreased fertility...

"4. Increase in incidence of other non-neuroplastic diseases not common to the species even during the senescent period...

"5. Induction of neoplasms rarely, if ever, occurring spontaneously in a species, but caused by the destructive actions of radiation on specific tissues with the initial establishment of precancerous states..."

We do not feel that just the repeal of Warner will correct all the injustices dealt to our radiation victims but it will in some cases allow certain victims their Constitutional rights to their day in court. Not until we have an abolition of the Sovereign Immunity, a narrowing of the discretionary function exception to the Federal Tort Claims Act (FTCA), a reduction to its original intent of the Feres doctrine, repeal of the contractor immunity defense and any other exceptions to the FTCA that impair and impede our Constitional rights will our citizens be free of governmental control of our lives -- a right we fought for over 200 years ago.

SETTLEMENTS BY GOVERNMENT

In addition to the settlement reached with the Three Mile Islanders, Department of Energy (DOE) agreed July 1, 1989 to pay $73 million to settle a lawsuit by Ohio residents who claim that radioactive dust leaked by a nearby nuclear weapons plant (National Lead, Fernald, Ohio) had caused widespread injuries and

property damage. In 1981, DOE paid $10 million to property owners near the Rocky Flats, Colorado plutonium plant. In 1987, it paid $150 million to residents of the Marshall Islands, where nuclear bombs were exploded in the atmosphere during the 1950s.

May 1, 1988, after approximately 10 years of hearings in both Houses of Congress, then-President Reagan signed P.L.100-321, the "Radiation-Exposed Veterans Compensation Act of 1988," a bill to compensate certain veterans with certain cancers (13 of them) and widows of deceasesd veterans, through the Veterans Administration, their long-overdue service connected disability pensions. These amounts ranged from several hundred dollars a month to approximately $1,500, depending upon the percentage of disability, and in the widows' cases, it also depended upon their husband's rank at the time of his radiation exposure during the atmospheric testing period. Most of the widows receive only several hundred dollars a month. The majority of the recipients of this largesse are widows. The percentage of radiation-exposed veterans and widows benefiting from P.L. 100-321 comprise an extremely small number of those exposed since there are many other cancers and other types of illnesses attributed to radiation exposure, not to mention genetic defects to children of parents exposed to radiation, for which there is no compensation.

NARS is concerned that the few dollars awarded the radiation veterans and widows will see the end of any further awards to the remaining thousands of veterans who are not covered under P.L.100-321. We are also concerned that the small settlements to the

various civilians near the Rocky Flats Plant, Three Mile Island, Fernald, Ohio and the Marshall Islands will constitute the government's token awards and a substitute to litigation. We have yet to see any settlement with the Hanford victims, not to mention of course, our victims exposed as a result of nuclear testing -- soldiers, test site workers, "downwinders" and uranium miners.

Beyond comprehension is the fact that our government is selective in its award of settlement moneys to some radiation victims while fighting in the courts the award of token amounts to others. Why this disparity? Our government has spent millions defending its coverup over the years, only to finally admit in the past few years (post-Broudy v. United States) the lies perpetrated over the years of the dangers surrounding its nuclear bomb factories. Does Warner, discretionary function, contractor immunity, Feres, et cetera only apply to the victims of the nuclear testing era? Is our government afraid that if settlements are made to the victims of nuclear testing there would be an admission that testing is hazardous to our health, and that therefore a much larger hue and cry would result which would make the continued testing of bombs, albeit underground, more controversial, necessitating negotiations with the Soviets? Is this why then-President Reagan signed the veterans radiation bill at 4:00 o'clock on Friday with no press and no fanfare, in spite of the fact that he had threatened to veto the legislation? At the time of signing P.L. 100-321 Mr. Reagan stated that the bill was not an admission of the dangers of nuclear testing, it was only to recognize the special services this select group of veterans had performed. The American people

need answers to the foregoing questions.

PROPOSED LEGISLATION BY AT&T AND UNIVERSITY OF CALIFORNIA

Recently AT&T and the University of California proposed "Legislative Proposal for Consideration of Claims by Persons Exposed to Radiation from Above Ground Nuclear Weapons Testing." Our organization (NARS), along with other organizations, was approached by Senator Reid, Senator Simon and Senator Cranston to comment upon this proposal and express our views as to whether this was a reasonable alternative to the repeal of Warner. (AT&T and the University of California were defendants in the Consolidated Cases).

NARS has categorically rejected this proposal for the reasons outlined in our attached Response.

We would like to express our appreciation for the opportunity to express our views with regard to this very important subject.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS

RESPONSE TO PROPOSED LEGISLATION

GENERAL

The National Association of Radiation Survivors was established to assist all radiation survivors, both military and civilians, in their quest for redress of injuries, illnesses and, deaths related to exposure to ionizing radiation. This purpose would include anyone exposed from the beginning of the nuclear age to the present who wishes our assistance. While the majority of our current constituency is made up of those who were exposed during atmospheric testing, a growing segment of this constituency are those who were exposed by occupation or residence in and around nuclear weapons research/development, production and, testing facilities.

The Warner Amendment essentially gives immunity from legal suits to government contractors, such as universities and corporations, by substituting the government as defendent in such suits. As we know, the government then claims the Discretionary Function and Soverign Immunity defenses to prevent these suits from going forward.

From our perspective, the major flaw of this proposed legislation is that it only impacts those who were involved in above ground nuclear weapons testing. There is the implication in the proposal that the only time anyone was exposed and injured from radiation was during the period of atomospheric testing. There is no recognition of exposure prior to, or subsequent to atomospheric testing, and no recognition of the ways one might have been exposed. We have a constituency that is left totally out of this proposal and to whom the Warner Amendment would still be an obstacle in obtaining redress. This constituency would include, but not be limited to, the following:

1. Nevada Test Site Workers exposed during underground testing, such as occurred in the 1970 Baneberry test in which several workers were radiated during a venting of the underground test.

2. Residents of Washington, Oregon and, Idaho, who were deliberately exposed in a 1949 experiment in which Hanford released radioactive Iodine 131 into the surrounding environment. This is in addition to any other exposures that may have occurred during "normal" operations of the Hanford plant.

3. Workers and residents in and around other nuclear weapons processing plants such as Fernald, OH; Rocky Flats, CO; Savannah River, SC; INEL, ID; Lawrence Livermore Laboratory, CA; et al.

4. Residents and Farmers of the Ringold, Mesa, and Basin City areas who began farming the area of the South Columbia Basin Irrigation Project in the Northwest and who are experiencing serious levels of illness from the Hanford fallouts.

5. Those who were, according to Congressman Markey's 1986 report, subjected to radiation experiments by various universities and laboratories under contract to the government.

In addition, the Warner Amendment/Contractor Immunity concept has been applied to other suits related to injury and illness, such as United Technologies and the problems of their helicopters and Vietnam Veterans and Agent Orange/Dioxin cases. None of these groups would be helped in any way by this proposed legislation and would still experience Warner as an obstacle to resolving their issues.

Finally, the proposal is quite vague in that much of the details are left for Congress or a government agency to decide at some later date. The proposed Commissions would impose another layer of bureaucracy that survivors would have to go through while these bureaucracies would be dependent on the same government agencies and the information they provide for adjudicating claims.

SPECIFIC COMMENTS

I Proposal For All Groups: Other than a more liberal policy related to retroactivity of benefits, there does not seem to be any substantial difference between the proposal and recently enacted legislation such as PL 100-321 and PL 100-687 directed towards veterans. Since we have yet to determine the effectiveness of these two pieces of legislation in helping Atomic Veterans, it would appear to be premature to apply these same standards and rules for the other two groups.

While the retroactivity clause appears to be more generous than the above legislation, it appears to deny appropriate redress for those whose illnesses began or whose death occurred, prior to the enactment of the Warner Amendment, the later date defined in the proposal for retroactive benefits.

While the proposal mentions the possibility of revising the types of illnesses covered, there is at least an equal possibility that no revisions would take place. The proposed corrections to PL 100-321 outlined in the December 10, 1988 Federal Register still do not inlcude common problems such as cataracts and leaves the latency period for leukemia at 30 years.

CONCLUSION

In recent oral arguments in the U.S. District Court in Las Vegas, Nevada relating to the Prescott case, the government was requesting dismissal of the case based on Discretionary Function and Soverign Immunity since it had been substituted as the defendent for Reynolds Electric. The judge hearing these arguments commented to the effect that the plaintiffs were winning this case until Warner was passed and the government became the defendent.

Other cases have been lost strictly on the retroactive application of Warner such as the Allen and Consolidated Cases.

In the lawsuit of Alice P. Broudy v United States of America, et al., the U.S. District Court Judge notes in ruling in favor of the defendents' motion for Summary Judgement that, "the government has been aware of the hazards of radiation since the inception of the nuclear weapons program" and cites a number of different documents indicating that the government knew exposure to radiation could cause cancer, genetic defects, decreased fertility, cataracts and, of course leukemia. This also means that the university and corporate contractors also knew this from the beginning.

While the repeal of Warner offers no guarantees for survivors and would do nothing for veterans, it at least allows the others their day in court and a more objective process for adjudicating their claims. In terms of veterans, as mentioned above, there seems to be little in the proposal beyond exisiting legislation.

For all of the above reasons, NARS feels at this time that the repeal of Warner would best serve the constituency that has been deprived of their rights due to its passage in the first place.

Pat Broudy
Legislative Director
33492 Periwinkle Drive
Laguna Niguel, CA 92677

NATIONAL ASSOCIATION OF
RADIATION SURVIVORS

August 11, 1989

Hon. Howell Heflin
Subcommittee on Courts
and Administrative Practice
Senate Judiciary Committee
223 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Heflin:

Pursuant to your request of August 8, 1989 to respond to questions enclosed with your letter, you will find attached hereto two separate "answers" to your questions and those of Senator Thurmond, respectively.

We feel that until 42 U.S.C. 2212 is repealed that we are in no position to compromise or negotiate. The settlements made recently to the residents of Fernald, Ohio; Savannah River; Three Mile Island and Rocky Flats, were only made because there was litigation in progress, a right we have been denied.

Please forward when available, two copies of the transcript of the hearing.

We wish to thank you for the opportunity to testify before your subcommittee on the vital matter of the Repeal of the Warner Amendment and for the personal interest you have shown in that regard.

Very truly yours,

Pat Broudy

ANSWERS TO QUESTIONS POSED TO PAT BROUDY BY SENATOR HEFLIN

1. This legislation is needed for the reason that it will repeal a mistake which was admittedly made by Senator Warner in his testimony before your committee on August 3, 1989. Senator Warner stated "I was under the impression that this would benefit these veterans, civilian workers and their survivors. However, what resulted was an unexpected dismissal of hundreds of damage suits brought on by those affected."

The repeal of the Warner Amendment would allow those victims of nuclear testing who have in the past filed, and those who will in the future file, litigation against the contractors who manufactured the nuclear bombs or had anything to do with the deployment and explosion of those bombs. It will allow them their Constitutional rights to their day in court and a trial before a jury of their peers. Since the contractors would no longer be government employees (which they now are under Warner), and since the victims would be able to file in their state courts rather than the federal courts, there would not be the opportunity for the government to dismiss those actions under the Feres Doctrine, the discretionary function and any and all other exceptions to the Federal Tort Claims Act.

2. Our organization represents approximately 6,000 people.

This legislation would potentially benefit any of those victims of nuclear testing (not necessarily all of whom are members of our organization) who were exposed to the elements of the manufacture, deployment and explosion of nuclear weapons from approximately 1942 through the present, including any future victims injured during nuclear weapons testing, depending upon which statute of limitations they may be subject to. These include the test site workers, uranium miners, lab workers, the victims of fallout exposure ("downwinders"), and the American citizens of Japanese descent, who happened to be in Japan at the time of the dropping of the bombs at Hiroshima and Nagasaki. Also included are the servicemen stationed in the areas of Hiroshima and Nagasaki on cleanup duty after the atomic bomb drops, the servicemen exposed during the nuclear testing in the Marshall Islands, Christmas Island, at the test site in Nevada and those exposed off the coast of California during underwater testing off San Diego and while conducting radiological defense schools on the target vessels towed back from the Marshall Islands which had been off limits because of heavy plutonium contamination, at Hunters Point, San Francisco. Not all of these people will develop radiogenic diseases.

The different statutes of limitation (depending on the state in which the lawsuits are filed) problem will eliminate a

large number of lawsuits.

At this time we estimate that the number of lawsuits dismissed because of the Warner Amendment total approximately 300; including 43 of the Consolidated cases and 220 of the test site workers' cases (Baneberry and Prescott).

We cannot give you a number regarding the potential beneficiaries of the proposed legislation. As we indicated in the foregoing paragraphs, much of that depends upon the interpretations placed upon the various statutes of limitation.

3. Our organization is opposed to the initial compromise proposed by AT&T and the University of California for the following reasons:

(a) The proposed compromise does not provide for all of the victims of nuclear testing (see paragraph 2).

(b) Proposal for Veterans:

Other than the retroactive provisions in the proposal, it essentially gives the veterans what they already have in P.L. 100-321. In addition, the proposal adds another layer of bureaucracy (the independent review panel).

The composition of the independent review panel is of utmost importance to us. We have been through the VA process for many years and know that unless the claimant has an input into the selection of the individuals that it can be manipulated as has been done in the past with the selection by the VA of "independent" medical experts.

Regarding the appeals to the panel, we question at what point in the claims procedure the panel comes into play. Is it after the local board's denial? Is it after the local board's reconsideration? Is it after the BVA's denial? At what point does the DVA Administrator deny a claim? If the Administrator is reversed by the panel what is the next step?

If appeals from the decisions of the panel are allowed only by the veteran or surviving family when directed to the United States Court of Veterans Appeals, would the veteran or his family be represented by counsel? Define family. Is family limited to the widow/widower or does it extend to children?

Dosage:

When dosage is referred to, it is known that external dosage and internal dosage are two different things. Are we speaking here of internal dosage or external dosage? Dosages did vary from one test to another, and there has been a great deal of misinformation received from the DNA regarding the reconstruction of these tests. For instance, the Hood shot in 1957 has at least three or four different reconstructions, all done by the DNA. In addition, "hot spots" occurred in these tests caused by among other things, shifting winds, bits of radioactive

debris deposited in the vicinity of one man but not in the vicinity of others, the mode of travel to ground zero. If troops marched toward ground zero and walked through the area of tests that had occurred before, they would be exposed to more radiation than troops taken by truck, helicopter, et cetera. Troops in the forward trenches would be exposed to more dust and inhaled debris contaminated by alpha emitters (plutonium, strontium 90, tritium, etc.) Alpha emitters do not show up on a badge, but deposit themselves in the lung, and lymph nodes and 20/30 years later evidence of cancers begin to develop. So when we speak of dosages our position is that it is absolutely essential that we obtain internal dosages and not rely upon a level of exposure specified by Congress.

In choosing an expert witness, would the choice be made by the DVA or by the claimant? It has been our experience in the past that so-called expert witnesses have been chosen by the VA, and that those that were chosen by the claimant were ignored in the decisions or ridiculed.

If an ombudsman is provided to investigate claims of veterans who are unable to afford a lawyer, who selects the ombudsman, and what training does he/she have in the legal field.

Under the Retroactivity paragraph we question whether current recipients of VA benefits under P.L. 100-321 would be entitled to retroactivity to enactment of Sec. 2212 and/or date of onset.

In years past the DNA has conducted an outreach program and eventually about 55,000 persons contacted the DNA who had been exposed in the nuclear testing. Upon querying the DNA regarding the number of widows I was informed that the DNA did not keep track of the widows. I hope they have since changed their policy since this was early on in the outreach program. If the DVA conducts an outreach program to contact, within two years of enactment, all veterans exposed to atmospheric nuclear radiation and advise them of the new procedures, I'm afraid they'll find it impossible because of the large numbers of deaths in this group. We are curious as to how this can be accomplished in that in the past the VA has informed us that because of a fire in St. Louis most of the records were destroyed and that there were no records of radiation veterans.

We are happy to see the inclusion of the paragraph regarding the addition of service-connected diseases. We presume this includes diseases other than cancers. It is our desire to see the elimination of the 30- and 40-year latency period.

(c) Proposal for Civilian Employees

This proposal is essentially the same as that for the Veteran population. There are a few exceptions, however.

The proposal states, "Presumed dosages for veterans would probably exceed the presumed dosages for civilians." If the

civilian employees are test site workers they attended a lot more tests than the veterans, and true, they wore protective clothing, but how did that free them from inhaling radioactive contaminants when an underground test vented. The lab workers were not always wearing protective clothing when working with radioactive materials. How will the lab workers' dosages be figured. Again, badges do not measure alpha emitters and internal dosage.

In the Outreach paragraph we have the same questions we had in that paragraph of the Veterans Proposal. In addition it is stated that participants in the above ground detonations would be advised of the new procedures. There have been several ventings of underground tests where workers were exposed, i.e., Sedan in 1962, Baneberry in 1970, Mighty Oak in 1986 (vented for three weeks) and Misty Rain in 1986 to mention a few. Will the workers exposed to those tests be contacted as well?

All the responses to the Veterans Proposal can be incorporated in this Civilian Employees Proposal and where "veterans" are mentioned, substitute "civilian employee" therefor.

(d) Proposal for "Downwinders" and Uranium Miners

Since the proposal was promulgated a subsequent Hatch Owens Bill has been introduced in the 101st Congress, S.841 and H.R. 2372, both introduced April 19, 1989. Although we prefer this bill, we approve your Number 1 in this proposal which would replace the cancers in S.841 and H.R. 2372 with the list of thirteen cancers in P.L. 100-321. We do have a problem with the presumption periods mentioned, i.e., the 30- and 40-year latency specified in 100-321. We would prefer no latency period.

It should be noted here that some of the uranium miners are also "Downwinders" and as such are aware that they would be entitled to take if these proposals develop into law, from only one source, and that whichever is the most advantageous to such an individual, he/she may claim from that source. It is understood, however, that should that occur, the federal government shall receive an offset as outlined in Paragraph 3 of the AT&T/UC proposal.

COMMENTS BY THE NATIONAL ASSOCIATION OF RADIATION SURVIVORS

Since the "Downwinders" have been included in this proposal and since their lawsuit was not dismissed because of 42 U.S.C. 2212 but because of the discretionary function, we feel that any and all other lawsuits filed on behalf of injury or damage from nuclear testing and dismissed because of the discretionary function be included in these proposals.

ANSWERS TO QUESTIONS POSED TO PAT BROUDY BY SENATOR THURMOND

1. Approximately 300 including 43 of the Consolidated cases and 220 of the test site workers' cases (Baneberry and Prescott).

2. No. In my opinion an administrative remedy similar in concept to the "Radiation Exposed Veterans Compensation Act" would not provide a solution to this problem for the following reasons:

(a) In the case of the widows of the veterans, the most the widow could hope for would be several hundred dollars a month. The amount of the widow's stipend depends upon the rank her husband held at the time of his exposure. Most of these men were young men in the lower enlisted ranks. If that widow is supporting a family that meager amount does not go very far. In one case which I know of personally, the widow who lives in Tennessee is receiving $400 a month. She is able, because of the area where she lives, to make this amount stretch further than a widow who, for instance, lives in California. We do not feel that the amounts provided for in P.L. 100-321 are adequate to provide for the raising of a family and supporting the widow in her old age. The above assumes the veteran was rated at 100% disabled. Depending upon the percentage of disability the amounts could go from several hundred to zip.

(b) In my own case, my husband had retired on 20 years service and I was receiving an annuity provided and paid for by him, through the marine corps, in the amount of $565 a month (a percentage of his retirement pay). Under the Veterans bill I am now entitled to $797 per month. This amount is offset by the $565 per month I was receiving so that my net income is $232 per month over what I was receiving before enactment of P.L. 100-321. As you can see, this paltry amount is not enough to feed me in California, which makes it necessary for me to work. I don't know how much longer I will be able to do so, and I have the same worries as the rest of the widows -- the fear of losing my home and being out on the streets.

(c) In addition, medical bills for the last illness of the veteran can mount to something close to $50,000. So you see, sir, why we do not feel that an administrative remedy such as the veterans bill is sufficient.

(d) Since we have not been apprised of the number of veterans/widows who benefited from the enactment of P.L. 100-321 we cannot give you more factual information regarding the benefits. I do know personally, a gentleman who received 100% disability which amounts to over $1500 a month, and of course, he is delighted, since now he is also entitled to medical care and other benefits. The veterans' monthly payments do not depend upon his rank -- all 100% disabled veterans receive the same amount. This is another flagrant example of discrimination against women.

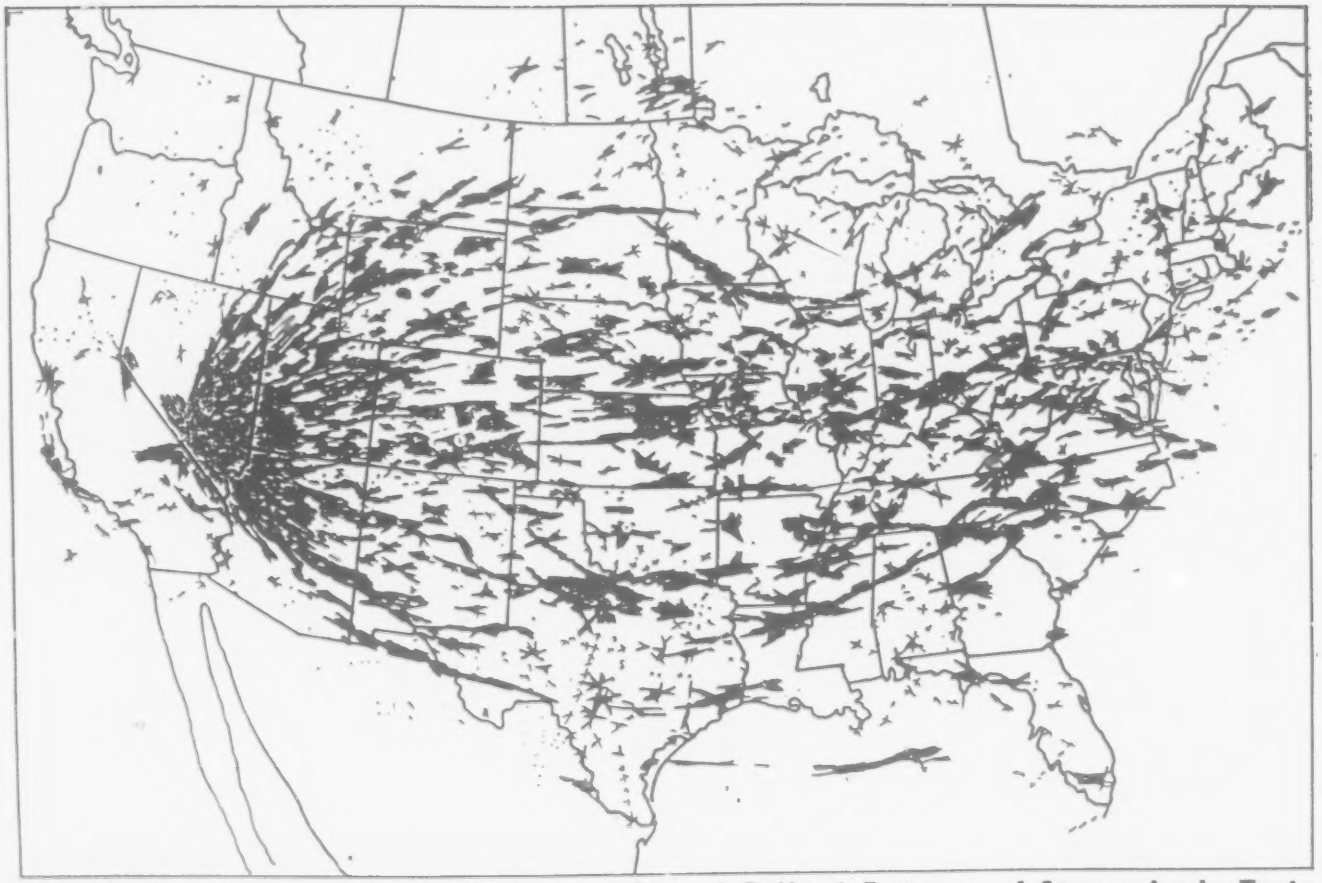
If the monthly amounts contemplated for the other classes of radiation victims approximate the same as the veterans/widows in the administrative remedy proposed by AT&T, the above references to veterans and widows income should suffice an answer to this question.

3. I have examined the administrative remedy proposed by AT&T and my comments are contained in my answers to Senator Heflin's questions (3 on page 2).

4.(5.) The concept of "downwinders" as used in our description of citizens living downwind of the Nevada Test Site, comprise those people living predominantly in the area east to north but generally northeasterly of the test site. This area is north of Grand Canyon in Arizona, southern Utah and southeastern Nevada. (See attached map, both sides). In this particular area there are approximately 250,000 people.

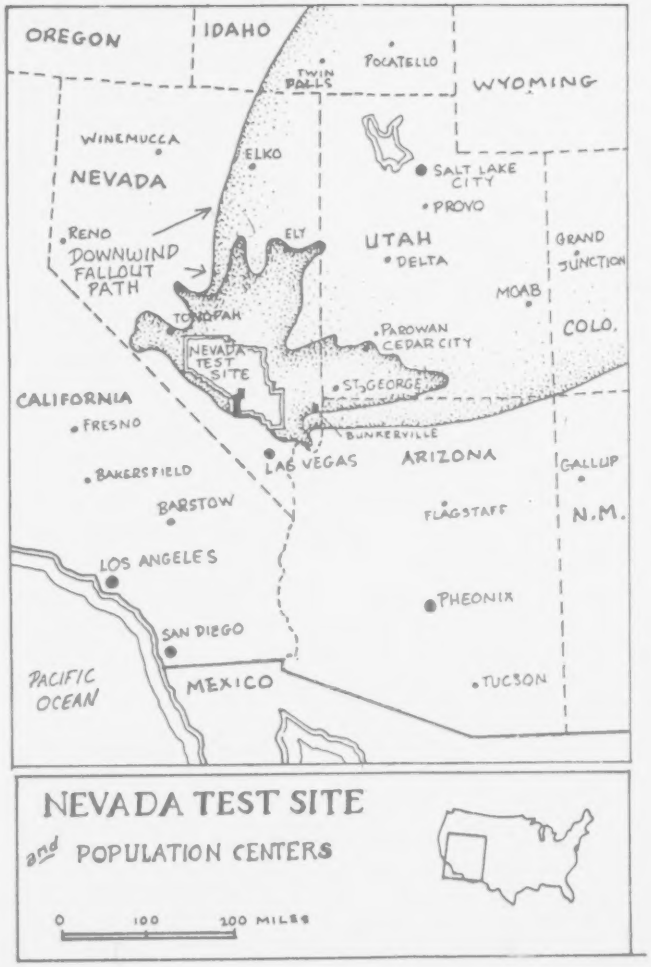
I do not know the extent of their exposure; however, 1192 people initially filed litigation and that amount swelled to 1500 subsequently in the Allen case. Of that number 24 were named as bellweather cases. These were selected on the basis of representing the entire class because their cancers (or those of their relatives) were typical of the class. Ten of the 24 cases were adjudicated favorably and a judgment was entered on their behalf at the district court level. The government appealed that decision to the Tenth Circuit and after approximately three years a decision to dismiss on the grounds of the discretionary function exception was entered.

Upon enactment of S.982, we anticipate that very few new cases (if any) will be filed because of the statute of limitations. On April 19, 1989 Senator Orrin Hatch and Congressman Wayne Owens introduced S.841 and H.R. 2372 respectively which would compensate certain downwinders and certain uranium miners $50,000 and $100,000 each, respectively.



U.S. Weather Service Composite Map - Actual Fallout Patterns of Atmospheric Tests

Source: "Under the Cloud" by Richard Miller



NEVADA TEST SITE (NTS) FACT SHEET

-NTS occupies 1,350 sq. miles of Southern Nevada (Western Shoshone treaty lands).
-NTS operated by Dept of Energy - employes approx. 8000.
-1986 DOE fiscal budget: Approximately $981 million.
-ReeCo NTS prime contractor, 5 year contract renewed for $2.5 billion on 10-1-88.

-Jan. 27, 1951: First test at NTS "Able" 1 kt. Cannon Shot.
-Spring 1953: Many animals die from fallout, people effected.
-1955: First citizen lawsuits-Sheep Case, Bulloch vs U S Gov.
-1957: First underground test "Rainier."
-July 17, 1962: Last atmospheric test.
-August 1963: Limited Test Ban Treaty- Limits tests to underground.
-March 31, 1976: Threshold Test Ban Treaty-limit to 150 kt.
-January 1984: Congress passed Marshallese compensation legislation for victims of testing in the Pacific 1945-62.
-May 10, 1984: U.S. District Court finds Government guilty of neglience in 10 of 24 test cases in landmark "downwind" lawsuit (Allen Case).
-April 20, 1987: Allen Decision reversed by 10th Circut Ct. based on "Descretionary Function."(King can do no wrong.) U.S. Supreme Court upholds Circut Court, Jan. 11, 1988.
-Jan. 1987: Supreme Court lets May 1985 Appeals Court Decision stand, overturning Judge Christiansen's 1982 Decision to reopen Sheep Case, based on government witness fraud in 1955 orginal case. "Descretionary Function" was justification, not evidence or merits of case.
-May 20, 1988: Congress passes HR 1811, "Radiation Exposed Veterans Compensation Act",covering 13 cancers. (PL 100-321).

TOTAL TESTS AT NTS (January 1, 1989)
-686 Admitted, (approximately 220 covert)
-Approximately 100 in atmosphere
-27 "peaceful" Plowshare tests conducted through 1974
-Cost per test: $6 to $ 60 million - $20 million average
-Underground test leaks: 45-97 (10% to 20% of all tests)
-Last admitted leak: "Mighty Oak," April 10, 1986. Venting continued for 3 weeks, acknowledged May 1.
-Star Wars will mean 1000 adittional tests (100-200 leaks).

EFFECTS: Radiation accumulates with each additional exposure.
-1979 - Study by Dr. Lyon: Leukemia rate 2 1/2 times higher in Southwest Utah.
-1982 Study: 109 excess cancers in downwind pop. of 4000.
-1984: Dr. Carl Johnson's study found excesses of cancer in "Downwind" population ranging from 0.7 to 14 times higher than should be expected.
-1987: Radoatopm Effects Research Foundation (RERF) Report shows 16.5 times greater effect from low level radiation than earlier BIER reports.

Senator HEFLIN. Professor Fletcher.

STATEMENT OF PROFESSOR FLETCHER

Professor FLETCHER. Mr. Chairman and members of the committee, I am William Fletcher, Professor of Law at the University of California, Berkeley. I am here, however, not as a representative of my university. My university is taking a position in this matter which I deeply regret.

The Warner amendment is a disgrace to our Government and to our Nation. It is a standing reproach to the Congress that allowed it to pass, to those who advocated its passage, and to those who now oppose its repeal.

I listened with some astonishment to Mr. Schiffer a few moments ago from the Justice Department, when he claimed that all he was interested in was avoiding special treatment for certain classes of plaintiffs. The issue is quite the other way. What we should be interested in is avoiding special treatment for special classes of defendants. Let me be very clear what I mean and how this came about.

The nuclear weapons testing program began, as we all know, in the 1940's, and was continued with open-air tests through the early 1960's. It continues today underground. The U.S. Government did not carry on those tests and does not today carry on those tests alone; it is assisted by several private labs contracting with the Government.

The Government from the beginning recognized that the labs and private contractors did not and had never shared the same defenses of the U.S. Government. They had available to them the Government contractor defense, which in many circumstances was a powerful defense, but it was not immune in the same way the U.S. Government was. Therefore in the 1940's, the U.S. Government entered into contracts with all of these contractors under which they would be indemnified for judgments and attorneys' fees.

So stood the law until the early 1980's. A number of suits filed by veterans and some civilians, primarily in California and Nevada, stimulated the contractors to run to Congress seeking help. The contractors were unwilling to defend the suits on the merits, unwilling to rely on the Government contractor defense. Instead, they wanted a blanket, retroactive immunity to protect them against suits that had already been filed. In other words, what they wanted was a retroactive change of rules, applicable only to them, to save them from having to face up to the consequences of that which they had done.

The Warner amendment first came before this Congress in front of the House in 1983. There were hearings held on the Warner amendment at that time. The House Judiciary Committee rejected it as unconstitutional. The following year, at the request of the administration, as Senator Warner has today testified, it was attached as a rider and passed into law. As it went into law, it was mis-described. The covering documents described it as providing a remedy against the United States as a codefendant. That was flatly

wrong. What it did was to produce the United States as the sole defendant and to take away remedies previously available.

The U.S. Government was then able to assert the Feres defense for suits by the contractors and the sovereign immunity-based of discretionary function under the Federal Tort Claims Act. This resulted in dismissal of all the pending suits, with virtually no discovery, and necessarily no open testimony in court.

The Warner amendment accomplished from the standpoint of the Government and the contractors two things. It saved a fair amount of money, the precise amount undetermined. Second and I think more important, particularly from the standpoint of the contractors, it prevented court-ordered discovery and open court testimony. In polite language, it was a device enabling the laboratories to avoid confrontation with that which they had done. In plain language, it was a coverup.

The laboratories and the Government are now appearing before you, asking to perpetuate this special treatment. They wish to allow a change of rules in suits already pending in order to protect themselves. That is a violation of the separation of powers. Congress should not have the power to change the rule in pending suits when that is the primary purpose of that change of rule in order to protect the U.S. Government's interest.

It is a matter of enormous regret to me that the United States Supreme Court denied certiorari in the *Konizeski* case in order to make that point clear.

As it now stands, the administration and the labs have joined forces in an unfair and tricky way to deny benefits to veterans and to civilians injured by radiation. Those veterans and those civilians believed strongly in a just country, a country built on justice and truth, not on tricks and coverups.

I would be delighted to respond to questions on this or on the proposal by AT&T. Thank you very much for your attention.

[Prepared statement of Professor Fletcher follows:]

TESTIMONY OF PROFESSOR WILLIAM A. FLETCHER

ON S. 982

BEFORE THE

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

101st Congress, 1st Session

August 3, 1989

Mr. Chairman and Members of the Committee:

I am William A. Fletcher, Professor of Law at the University of California, Berkeley (Boalt Hall). I am a specialist in Federal Jurisdiction and Constitutional Law, and have written extensively on sovereign immunity and jurisdictional questions. I have been invited by the Committee to submit testimony on S. 982, a bill that would repeal the so-called Warner Amendment, 42 U.S.C. §2212.

The Warner Amendment is a disgrace to our government and to our nation. It is a standing reproach to those who advocated its passage, to the Congress that allowed its passage, and to those who now oppose its repeal.

The story of the Warner Amendment begins after World War II. Between 1946 and 1962, the United States conducted a number of atmospheric tests of atomic weapons. The government was assisted in designing and conducting these tests by several independent companies and scientific laboratories working under contract with the government. These contractors include Sandia Corporation, a subsidiary of A. T. & T.; Reynolds Electric Engineering Company; and Lawrence Livermore Laboratory and Los Alamos Scientific Laboratory, both operated by the University of California.

The first of these atmospheric tests were carried out in the Pacific, but most were conducted in Nevada. Repeatedly during these tests, servicemen on active military duty were exposed to significant doses of radiation. Much of the exposure was deliberate. For example, between 1951 and 1962, some 80,000 servicemen were exposed to detonations in the Nevada desert. Some of them were positioned in open trenches with no special protective clothing, as near as one mile from the explosions. When the bombs went off, many of the soldiers could see the bones of their hands and arms as they held them before their faces. In many of the tests, soldiers were marched immediately after the explosions to within a few hundred yards of ground zero.

The servicemen who participated in these tests have come to be known as the "atomic veterans." Many of them are now dead from radiation-induced diseases resulting from the exposure. Many others are suffering from or dying from those diseases. Others will become ill in the future.

The United States was, and is, immune from suit for injuries or death suffered while on active military duty, under the doctrine of Feres v. United States, 340 U.S. 135 (1950). Government contractors have never shared the sovereign immunity of the United States. They are protected by the "government contractor defense" if they acted at the specific direction of the United States, which is a narrower defense than the sovereign

immunity defense available to the United States under Feres. See Boyle v. United Technologies Corp., 108 S.Ct. 2510 (1988).

The possibility of successful suits against the contractors has been recognized from the beginning of the atomic weapons testing program. The United States therefore entered into indemnification contracts with the contractors in the 1940's, under which it agreed to reimburse them for any attorneys' fees and damage judgments arising out of the atomic weapons testing program. These contracts have been continuously in force since that time.

In the early 1980's, a number of atomic veterans and their survivors filed lawsuits against the contractors that had helped to design and conduct the atmospheric tests. The contractors were unwilling to defend these lawsuits on the merits or to rely on the government contractor defense. Rather, they immediately went to Congress and lobbied for a new statute that would fully immunize them from the consequences of their acts. In 1983, the House Judiciary Committee held hearings on the contractors' proposal. Litigation Relating to Atomic Testing: Hearing on H.R. 2797 Before the Subcomm. on Administrative Law and Government Relations of the Comm. on the Judiciary, 98th Cong., 1st Sess. 19 (June 7, 1983)(Sec. 213). The Department of Justice supported the contractors, and proposed that Congress adopt what eventually became the Warner Amendment.

After the hearings, the House Judiciary Committee concluded that the contractors' and the United States' proposals would be unconstitutional. H.R. Rep. No. 124, 98th Cong., 1st Sess., part 4 (1983). Because of the Committee's adverse report, neither the proposal of the contractors or of the government reached the floor of the House.

The next year, Senator Warner of Virginia attached the government's proposal as a rider to the Department of Defense Authorization Act. No committee hearings were held on Senator Warner's amendment in either the House or the Senate. It became law in 1984. Pub. L. 98-525, codified at 42 U.S.C. §2212. Under the amendment, the United States may substitute itself for contractors that have been sued for deaths or injuries arising out of the atomic weapons testing program. After the United States has replaced the contractors as a defendant, it may assert the defense of sovereign immunity even though that defense was never available to the contractors.

From the standpoint of the contractors and the government, two things would be achieved by the Warner Amendment. First, no compensation would ever be available to the atomic veterans in their suits against the contractors. Thus, the government would be saved from having to reimburse the contractors under its indemnification contracts. Second, the veterans' suits would be dismissed at a very early stage, before significant compulsory court-ordered discovery would be possible, and before any

testimony could be offered in open court. Thus, the contractors and the government would be saved from the embarassment of having spread on the public record what they had done. In plain language, the Warner Amendment would serve as a cover-up.

It is safe to say that Congress was not aware of the significance of the Warner Amendment. Indeed, I am willing to believe that Senator Warner himself was not aware of its significance. The legislative history of the amendment shows that the amendment was inaccurately described, and thus misunderstood, as it made its way into law.

The reports of the House Committee on Armed Services and the Senate Committee on Armed Services both described the Warner Amendment as facilitating coordination of suits by permitting "the consolidation of these many cases under the leadership of the Department of Justice, with the United States as a co-defendant." H. Rep. No. 124, 98th Cong., 1st Sess. 29 (1983)(emph. added); S. Rep. No. 500, 98th Cong. 2d Sess. 374 (1984)(identical wording). If the consequence of the Warner Amendment had been merely to permit the United States to enter the suit as a co-defendant, I would not be here today. But the amendment in fact permits the United States to be substituted as the sole defendant, thereby eliminating the contractors entirely from the suit and paving the way for dismissal when the United States asserts its sovereign immunity.

The Conference Committee Report on the Warner Amendment continued the misleading description. It stated, "This section would provide a remedy against the United States for injury, due to loss of property, personal injury, or death due to exposure to radiation emissions by a contractor carrying out atomic weapons tests under a contract with, and under the direction and control of, the United States." H. Conf. Rep. No. 1080, 98th Cong., 2d Sess. (1984)(emph. added). The amendment does not "provide a remedy." Rather, it takes away a remedy that had previously been available against the contractors. For the atomic veterans, the remedy "provided" against the United States is entirely illusory because of the sovereign immunity defense.

After the passage of the Warner Amendment, the United States moved to substitute itself in the suits then pending against the the contractors. Then, predictably, it sought dismissal under Feres. The two Courts of Appeals to which the question has been presented have both sustained the constitutionality of the Warner Amendment and the dismissals. Hammond v. United States, 786 F.2d 8 (1st Cir. 1986); In re Consolidated Atmospheric Testing, 820 F.2d 982 (9th Cir. 1987), certiorari denied sub nom Konizeski v. Livermore Labs, 108 S.Ct. 1076 (1988). It is a matter of enormous regret that the Supreme Court declined to grant certiorari in the Konizeski case, for the formidable constitutional issues posed by the Warner Amendment are thus left unresolved.

The legal academic community has been scathing in its criticism of the Warner Amendment. Note, "1985 Department of Defense Authorization Act: Leaving Atomic Veterans at Ground Zero," 20 Val.U.L.Rev. 413, 444 (1986) (Warner Amendment is "disingenuous," and "constitutionally objectionable"). Note, "Constitutional Fallout from the Warner Amendment: Annihilating the Rights of Atomic Weapons Victims," 62 N.Y.U.L.Rev. 1335, 1375 (1987) (Warner Amendment "undermines justice and fairness" and is "unconstitutional"). Comment, "Section 2212: A Remedy for Veterans -- With a Catch," 75 Calif.L.Rev. 1513, 1558 (1987) ("The courts should recognize the unfairness of the catch in section 2212 and refuse effect to this unconstitutional law."). Titus and Bowers, "Konizeski and the Warner Amendment: Back to Ground Zero for Atomic Litigants," 1988 B.Y.U.L.Rev. 387, 408 ("[F]urther action on compensation for downwinders or repeal of the Warner Amendment will have to come from Congress. We would argue that either, or both, actions are warranted.").

The core of the difficulty is that the Warner Amendment is entirely retroactive. It was not designed to affect future conduct. Rather, it was designed to change the legal rules for long-since completed conduct, for the single purpose of changing the outcome in pending litigation. This retroactive application makes the Warner Amendment not only unfair but unconstitutional.

We should begin by understanding why retroactive legislation is disfavored. One reason is the rationale behind the

constitutional prohibition against ex post facto laws. The objection lies, in Dean Ely's words, in "attaching untoward [and, I would add, unforeseen] consequences to an act performed before [the statute] was enacted." J. Ely Democracy and Distrust 91 (1980).

But the vice of retroactive application goes beyond the violation of expectation. It goes, in addition, to the danger that legislation can be used to the advantage or disadvantage of particular, identifiable groups. Prospective legislation operates fairly because people potentially subject to the legislative command are identifiable, if at all, only by predicting the behavior of those people. Retroactive legislation, by contrast, permits the legislative body to identify people whose conduct has taken place, and to penalize or reward precisely those people. In other words, retroactive legislation offers to the legislature a tool by which, under the guise of facially neutral commands, it may penalize or reward easily identifiable people or groups whose conduct is complete.

Finally, when the retroactive legislation is designed to change the result in pending lawsuits, another objection is raised. If the government can change at will the outcome of a pending case in which it has an interest there is no true rule of law, only a rule of raw power To allow such action by the government is to invite corruption and abuse.

The Warner Amendment is undesirable retroactive legislation in all the respects outlined above. There are two serious constitutional objections that arise directly out of this retroactivity.

First, the deprivation of an accrued cause of action may constitute an unconstitutional taking of property without just compensation. The Supreme Court has repeatedly indicated that accrued causes of action constitute property for purposes of the takings clause. For example, in Armstrong v. United States, 364 U.S. 40, 46-49 (1960), the Court held that action of the United States, which had the consequence of destroying the value of plaintiff's materialmen's liens under State law, constituted a taking for which compensation was due. Further, as recently as 1981, the Supreme Court sustained the power of the President to suspend private causes of action against the Government of Iran. But even here, where the Executive power over foreign relations was at stake, the Court pointedly noted that a taking claim was not extinguished: "Though we conclude that the President has settled petitioner's claims against Iran, we do not suggest that the settlement has terminated petitioner's possible taking claim against the United States." Dames & Moore v. Regan, 453 U.S. 654, 689 n. 14 (1981). In the situation now before us, significant numbers of people injured or killed by radiation had accrued causes of action against private contractors. The consequence of the Warner Amendment has been to make these causes of action worthless. Under the precedents of the Supreme Court,

the Warner Amendment very likely constitutes an unconstitutional taking.

Second, the Warner Amendment violates the principle of separation of powers because it was designed to change the law in pending suits in order to the protect the government. This is the most powerful of all the constitutional arguments against the Warner Amendment.

Our government is built on the principle of separation of powers. Subject only to the veto power of the President, Congress is responsible for the enactment of our statutes. The federal courts are responsible for application of these statutes to cases properly brought before them. When a case involving a particular statute is pending before a court, Congress -- anticipating a result unfavorable to the government -- should not be able at this late stage to change the law. If it attempts to do so, Congress is stepping outside its proper sphere.

The fountainhead case is United States v. Klein, 80 U.S. (13 Wall.) 128 (1871), in which Congress sought to prevent Southerners who had participated in the Civil War from relying on a Presidential pardon to show their right to a restoration of their property. The Court struck down the statute by which Congress sought to achieve its end, saying that Congress had tried "to prescribe a rule for the decision of a cause in a particular way." 80 U.S. (13 Wall.) at 146. The present Supreme

Court has characterized Klein as holding the statute unconstitutional because "it prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor." United States v. Sioux Nation of Indians, 448 U.S. 371, 404 (1980).

In a situation now before us, it is clear that the United States has accomplished through the Warner Amendment precisely what Klein and Sioux Nation say it cannot do. It has changed the rule of decision in cases pending before the courts, and it has done so in a manner that requires a decision in its favor. The rule has clearly been changed in pending cases: the United States is substituted as a defendant and is then permitted to assert defenses previously unavailable against the plaintiffs. This consequence is not an incidental side effect of a statute passed for other reasons. The very purpose of the Amendment was to interfere with pending suits. As Deputy Assistant Attorney General Robert Willmore testified before the House Subcommittee of the Judiciary Committee during hearings on the Boucher bill in 1985, "[I]t was as a result of the development of these lawsuits, particularly the very large growth in this litigation in California, that brought the contractors and the administration to Congress, and that necessitated some congressional action; section 1631 [the Warner Amendment] was the result." "Litigation Relating to Atomic Testing," Hearings Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on

the Judiciary, 99th Cong, 1st Sess. 155 (October 2 and 3, 1985).

It is also clear that the change effected by the Warner Amendment works in the United States' favor. If the contractors had been forced to rely only on the defenses available to government contractors and had suffered judgments against them, the United States would have been obliged to hold them harmless under their indemnification agreements. But the Warner Amendment permits the United States to step into pending suits and to assert previously unavailable defenses, thereby protecting its contractors (and therefore itself) from liability.

I am reluctant to criticize our Courts of Appeals, but in this case I must do so. Both the Ninth Circuit in the Konizeski case and the First Circuit in Hammond sustained the Warner Amendment because they thought it was like the Swine Flu Act, and like federal statutes involving federal motor vehicle drivers and medical personnel. Konizeski, 820 F.2d 982, 988 (9th Cir. 1987) ("In adopting this legislation, Congress broke no new ground."); Hammond, 786 F.2d 8, 12-13 (1st Cir. 1986) ("This is not the first time Congress has substituted the government as defendant."). However, the Warner Amendment is radically unlike the Swine Flu Act and the statutes involving federal drivers and medical personnel.

The Swine Flu Act provided that the United States would be substituted as a defendant for swine flu vaccine manufacturers

in suits arising out of the swine flu innoculation program. 42 U.S.C. §247b (revised and in pertinent part now repealed by Pub. L. 95-626 (1978)). The Swine Flu Act was different from the Warner Amendment in two respects. First, unlike the Warner Amendment, the Swine Flu Act was explicitly made entirely prospective. 42 U.S.C.§247b(k)(2)(A) (now repealed). The statute was passed before the vaccine was manufactured and distributed, it changed no pre-existing legal relationships, and it affected no pending litigation. Second, unlike the Warner Amendment, the Government's liability under the Swine Flu Act was determined under the substantive law applicable to the vaccine manufacturers. The United States could only assert the defenses that had been available to the vaccine manufacturers.

Under the statutes involving federal drivers and medical personnel, the United States is treated as the defendant when such employees are sued for damages. See, e.g., 28 U.S.C. §2679(b)-(e) (Federal Drivers Act); 10 U.S.C. §1089 (Armed Forces health care providers). There is no indication that these statutes were ever applied retroactively. Moreover, they are familiar applications of the traditional principle that damage suits against employees of the sovereign are suits against the sovereign. Such suits contrast sharply with suits against government contractors, which have never been treated as suits against the United States.

The Warner Amendment is unique in the annals of our law. I have never seen such a statute, and I hope never to see such a statute again. In the end, the Warner Amendment is no more than a shabby trick. It is a trick played on veterans and their families, who have served their country with selflessness and devotion and who have sacrificed far more than the ordinary measure. These courageous people believe in a great nation built on justice and truth, not on legal trickery and cover-ups. The United States Senate should believe no less.

Senator HEFLIN. Senator Grassley, do you have any questions of Professor Fletcher?

Senator GRASSLEY. Mr. Chairman, I don't have any questions, and I must leave right away. But I just wondered if I could take 60 seconds to throw something out for your consideration. That would be, putting aside the merits of the issue momentarily—and this is a follow-on of the question I asked the representative of DOJ—at a minimum, Mr. Chairman, I would think that we would be grossly negligent in the consideration of this legislation if we didn't at least request the Administrative Office of the Courts to assess the workload impact of this bill on the courts. I would be very happy to work with the chairman to obtain this necessary information. And I guess this is pretty close to the work that you and I are doing as members of the Court Study Committee that Justice Rehnquist appointed each of us to, along with several other citizens and judges of the United States, because in that court study work, we are considering that we ought to have some sort of an understanding on the part of Congress every time it passes legislation as to what is the impact on the courts, because the growing workload of the court is quite a worry and quite a concern of our study committee.

I suppose what I am asking here is along the lines of a judicial impact statement that we would look at in terms of this legislation. I think we would be going contrary to our concern in that committee if we did not, so I would just ask for your consideration. I don't particularly expect you to comment right now.

Senator HEFLIN. All right. We'll be giving some thought to it.

We will probably submit some questions in writing to the members of this panel, and we would appreciate your prompt reply to them, and we may have some questions for Mr. Johns as to his statement, so we'll submit those in writing as well and would appreciate prompt replies, if we could.

Senator HEFLIN. Our next panel consists of Mr. Thomas Thomsen, president, AT&T Technology Systems, Berkeley Heights, NJ; and Dr. James Kane, special assistant to the senior vice president for academic affairs, Office of Laboratory Affairs, University of California at Berkeley.

Mr. Thomsen, we would be delighted to hear from you now.

PANEL CONSISTING OF THOMAS R. THOMSEN, PRESIDENT, AT&T TECHNOLOGY SYSTEMS, BERKELEY HEIGHTS, NJ; AND DR. JAMES KANE, SPECIAL ASSISTANT TO THE SENIOR VICE PRESIDENT FOR ACADEMIC AFFAIRS, OFFICE OF LABORATORY AFFAIRS, UNIVERSITY OF CALIFORNIA, BERKELEY, CA

STATEMENT OF THOMAS R. THOMSEN

Mr. THOMSEN. Thank you, Mr. Chairman.

I am the president of AT&T Technology Systems. AT&T is the parent of Sandia Corp., the managing contractor for Sandia National Laboratories, which is engaged in nuclear weapons research and development for the Department of Energy.

I have a formal statement for the record, but I will summarize that testimony in my remarks right now.

The relationship between the Federal Government and the National Laboratories was born in the aftermath of World War II.

President Truman personally appealed to AT&T to assume the management of Sandia in 1949, and for the last 40 years AT&T has continued this responsibility as a corporate public servant for no fee and no profit. By law, only the United States can conduct nuclear weapons testing. Because this work involves unusual and unpredictable risk, AT&T's agreement with DOE provides that AT&T and Sandia Corp. are fully indemnified by the United States. But while this indemnity prevents us from facing financial exposure if 1,631 were repealed, Sandia and AT&T could be harmed in other serious ways. It would plunge the claimants, the contractors and the Government back into the morass of lawsuits that 1631 was passed to avoid. Repeal would place the burden of defending claimants' lawsuits on the National Laboratories and their managing contractors. In the process, it would subject them to attacks on their reputation, divert valuable resources away from their national security mission, require them to defend the actions of the Federal Government for its nuclear weapons program, and dissipate the effectiveness of this national resource.

For the claimants, repeal means lengthy and expensive lawsuits, inconsistent and unpredictable treatment, and no guarantee of compensation. Instead of fulfilling its stated goals, repeal only subjects its intended beneficiaries to further frustration and delay.

Our common objective is to find a way to fairly compensate those who may have been exposed to radiation from the Government's testing program. It is my view that the answer lies in an administrative solution. To that end, AT&T and the University of California have a proposal that incorporates that approach.

Congress has already started down the administrative path. Public Law 100-321 provides a presumption of service-connected injury to veterans and survivors of the atmospheric weapons testing program who suffer from any of 13 cancers. It entitles them to automatic veteran and survival benefits.

A similar approach was adopted in 1985 as a part of the compact of free association for Marshall Islanders and Micronesians.

Our proposal builds on this administrative framework and extends its provisions to groups not currently covered. They include veterans who may not have been addressed in last year's legislation and civilian employees working at the test sites. It also draws on Senator Hatch's bill, S. 841, for downwinders.

The proposal extends the principle of service-connected injury adopted in 100-321 to civilian employees and downwinders for the specified cancers. Congress' acceptance of this principle means proof of fault on the part of the Government or the contractor is not required to establish eligibility for benefits.

It also provides special review panels to assure that veterans' and employees' appeals or claims are adjudicated fairly, expertly and expeditiously. The panels would be authorized to recommend additions to the list of diseases presumed to be service-connected. For civilian employees, these panels would be integrated with procedures under the Federal Employees' Compensation Act.

The relief provided by this proposal for veterans and civilians for injury, property damage or death would be exclusive. To overcome a situation where claimants were denied relief due to passage of 1631, our proposal ties retroactive payment of these benefits to

either the onset of illness or the date that 1631 was enacted, whichever is later.

In prior Congresses, it appears that repeal of 1631 has been debated as if it were unrelated to the issue of providing an administrative remedy for radiation claimants. We believe that S. 892 presents a clear choice for Congress between the courts on one hand and an administrative remedy on the other. In the final end, Federal money pays for either approach. I believe that administrative remedy is clearly preferable because it would best serve the claimants, the public, the National Laboratories and their managing contractors.

AT&T would be happy to work with the Congress in support of our joint proposal or any other fair administrative proposal.

Thank you.

[Prepared statement of Mr. Thomsen and additional material follow:]

Statement of Thomas R. Thomsen
before the Senate Judiciary Committee
Subcommittee on Courts and Administrative Practice

August 3, 1989

Good afternoon, Mr. Chairman and members of the Subcommittee. My name is Thomas R. Thomsen, and I am President of AT&T Technology Systems. My organization is responsible for Sandia Corporation, which manages Sandia National Laboratories, one of three Department of Energy Laboratories engaged in nuclear weapons research and development. I appreciate the opportunity to present my views on S. 982, which would repeal Section 1631 of the 1985 Defense Authorization Act.

Congress passed Section 1631 in recognition of the fact that the United States controlled the nuclear weapons testing program, and that suits were brought against the contractors "for the obvious purpose of escaping the well-known limits on the government's waiver of sovereign immunity." In re: Consolidated United States Atmospheric Testing Litigation, 820 F. 2d 982, 989 (9th Cir., 1987). That court of appeals decision acknowledged that the National Laboratories were instruments of national policy, and that Congress required the United States to respond to claims against the contractors. The decision effectively ended the radiation litigation pending against federal contractors.

Congress now has a choice. It can simply repeal Section 1631 -- and plunge the claimants, the contractors, and the federal government back into the morass of lawsuits that Section 1631 was passed to avoid. Or it can find another way to genuinely help those who may have been

exposed to radiation by the Federal Government's above ground testing program.

I believe Congress has already started down a wiser path by seeking to fashion an administrative remedy. Congress enacted such a remedy for veterans suffering from any of thirteen cancers (Pub. L. 100-321), and for Marshall Islanders in the recent Compact of Free Association. The same administrative approach is needed for the remaining claimants. To that end, AT&T and the University of California, which is the managing contractor for Sandia's sister National Laboratories, Los Alamos and Lawrence Livermore, have a proposal for relief that builds on the administrative framework already adopted by Congress, drawing as well from Senator Hatch's bill for downwinders, S. 841. A copy of that proposal is attached. We believe this approach will provide lasting, more certain, and more equitable relief to interested claimants, without dissipating the effectiveness of the National Laboratories.

History and Role of Sandia National Laboratories

To understand the effect that repeal of Section 1631 would have on the National Laboratories, it might be of value to better understand the Laboratories' mission and the circumstances of the Laboratories' creation. The relationship between the federal government and its contractors was born in the aftermath of a world war, to bring a special management expertise to a critical national security resource. In 1949, President Truman made a personal appeal to AT&T to assume the

management of Sandia and thus "render an exceptional service in the national interest." (A copy of the President's letter is attached.) For the last 40 years, AT&T has continued this responsibility as a corporate public servant, for no fee and no profit. We are proud of the contribution we make as Sandia Corporation's parent in supporting the nation's nuclear defenses.

AT&T's role at Sandia National Laboratories is limited. Every aspect of the Laboratories' operations has been under the government's control and direction. Neither AT&T nor Sandia Corporation has any financial interest in the physical laboratories or ownership interest in the properties. All assets and properties at the Laboratories are owned by the United States. All funds to operate the Laboratories are drawn directly from government accounts.

By law, only the United States can conduct nuclear weapons testing. Laboratories personnel who assisted in the testing acted under stringent controls, carrying out the directions of government officials responsible for the tests. Here is how the Ninth Circuit Court of Appeals described the tests:

> Every phase of the preparation and implementation of each nuclear weapons test series was closely controlled and supervised by government officials. Initially, proposals for tests had to be approved at various levels by the responsible divisions of the AEC and the Department of Defense. Before any test took place, a detailed Operation Plan had to be reviewed and approved by the AEC, by the National Security Counsel, and finally by the President.

In re: Consolidated United States Atmospheric Testing Litigation, 820 F. 2d 982, 985 (9th Cir., 1987). Because work under the contract involves unusual and unpredictable risks, AT&T's agreement with DOE provides that AT&T and Sandia Corporation are fully indemnified by the United States.

The Harmful Effects of Repealing Section 1631

Since it is fully indemnified by the government, AT&T stands, to some degree, in the middle of this issue, between the United States and the radiation claimants. But while we would not face financial exposure if Section 1631 were repealed, Sandia and AT&T would be harmed in other serious ways. For example, our complete financial indemnification provides no protection for AT&T or Sandia from the dissipation of energies and the undeserved notoriety that would accompany any litigation.

In the press, in the courts, and in university recruiting offices, AT&T and Sandia would be called upon to defend the government's most basic decisions regarding the nuclear testing program itself. We would also be faced with explaining to our shareholders and customers why we, and not the United States, are asked to account for atomic weapons testing. At the annual Shareholders' Meeting, resolutions are sometimes proposed to require AT&T to discontinue its role at Sandia. Subjecting AT&T and the National Laboratories to suits would undoubtedly cause this criticism to increase.

Of more direct importance to the nation, repeal of Section 1631 would also debilitate the National Laboratories. Once again, engineers and scientists would be required to divert considerable time and resources away from research on critical systems work to reconstructing the state of scientific knowledge thirty and forty years ago. Fewer funds, and fewer scientists, would be available to carry on the vital task of improving the safety and reliability of the nation's nuclear defenses.

Sandia scientists, engineers and employees have always believed that they perform a vital service for our nation. They have also believed that they have the complete support of the federal government, which asks them to participate in the nuclear weapons research and development projects they work on daily. It would be an injustice to these men and women if that support were withdrawn by repeal of Section 1631, and they were required to defend in court the complex issues of the U.S. weapons testing programs.

More tragic to individual claimants is that they may never benefit from repeal of Section 1631. Their recovery in court is by no means assured. Substantial affirmative defenses are available to the contractors, including the "government contractor defense" articulated by the U.S. Supreme Court in Boyle v. United Technologies Corp., U.S. , 108 S. Ct. 2510 (1988). In the courts, plaintiffs would have to prove such essential elements as the contractors' fault (as opposed to the government's) and the critical causal link between the claimants' exposure to radiation and their illnesses. These considerations, and

the burden of lengthy trials, extensive discovery and soaring legal expenses, might well discourage the very people that Congress is trying to assist from seeking relief at all. In addition, repeal of Section 1631, and the resulting claims would impose tremendous demands on the nation's already overburdened judicial system.

The Benefits of an Administrative Solution

With the interests of all parties in mind, we believe that these claims should be addressed through an administrative remedy. Going to court presents serious problems for the claimants and also for the National Laboratories. Recovery is uncertain, and litigation is always expensive. An administrative solution, by contrast, is an efficient and equitable way of reaching everyone who suffered. It is also the best use of the government's scarce resources. With an administrative solution, most of the available funds would go to the claimants -- funds that would otherwise be diverted to pay the high cost of litigation. Thus government should be able to manage -- more effectively and predictably -- the cost-to-benefit aspects of this complex, emotionally charged issue.

Congress has already gone some distance toward providing an effective administrative solution for this problem. Last year, it adopted legislation (Pub. L. 100-321) extending a presumption of service-connected injury to veterans who participated in the nuclear testing programs and who suffer from any of thirteen cancers, entitling them to automatic veteran and survivor benefits. In 1985, as part of

the Compact of Free Association (H. J. Res. 187), Congress established a fund to compensate citizens of the Marshall Islands and Micronesia for loss or damage resulting from the nuclear weapons testing program conducted during the 1940s and 1950s. As a result of these measures, these claimants are treated with the nation's full measure of respect, receiving fair and equitable consideration through the application of administrative remedies.

The proposal AT&T and the University of California have developed extends the framework adopted by Congress for veterans and Marshall Islanders, and applies it to groups not currently covered by existing legislation. They include veterans who may not have been addressed in last year's legislation; civilian employees working at the test sites; and "down-winders" who live in areas affected by atmospheric nuclear testing.

While I won't attempt to describe the attached proposal in detail here, I will highlight a few of the basic elements. The proposal is based on the following premises: that claims should be given fair and comparable consideration; that compensation should be consistent within and across the groups; and that to the extent feasible, existing administrative programs for relief should be utilized.

The proposal therefore suggests that the two groups not covered by Pub. L. 100-321 -- civilian employees and downwinders -- be compensated, like the veterans, if they show that they contracted any of the thirteen cancers within the time frames established in that law.

Civilian employees would be entitled to benefits under the Federal Employees Compensation Act. Downwinders would be compensated as provided in S. 841, from a trust fund administered by an independent board, similar to the fund established for the citizens of the Marshall Islands and Micronesia. The proposal also provides for independent panels to review claims of veterans and civilian employees, and for a mechanism to expand the list of thirteen cancers if appropriate.

This proposal is intended to be flexible. We are hopeful that it will rekindle efforts to find a lasting, meaningful solution to a problem that the Congress has debated for several years.

The Congress is in some respects at a cross-roads on this issue. The administrative remedies laid out in Pub. L. 100-321 and in the Compact of Free Association could provide the framework for lasting relief for the remaining claimants. But Congress risks adopting a patchwork of remedies instead. In S. 841, for example, the list of cancers eligible for automatic relief is inconsistent with the list in Pub. L. 100-321. Other differences are inevitable as additional bills are introduced to benefit only certain classes of radiation claimants. A possible result is that disadvantaged claimants may return to Congress to seek more consistent treatment.

In prior Congresses, it appears that repeal of Section 1631 has been debated as if it were unrelated to the issue of providing an administrative remedy for the radiation claimants. We believe that S. 982 needs to be seen as presenting a clear choice for the Congress,

between the courts on the one hand, and an administrative remedy on the other. In the end, federal money will be expended to fund either approach. I believe that an administrative remedy is clearly preferable, and would best serve the claimants, the public, the National Laboratories, and their managing contractors. AT&T has contributed to the management of the National Laboratories for 40 years, and we would be happy to work with the Congress in support of such legislation, whether based on our joint proposal or some other fair approach.

THE WHITE HOUSE
WASHINGTON

May 13, 1949

Dear Mr. Wilson:

I am informed that the Atomic Energy Commission intends to ask that the Bell Telephone Laboratories accept under contract the direction of the Sandia Laboratory at Albuquerque, New Mexico.

This operation, which is a vital segment of the atomic weapons program, is of extreme importance and urgency in the national defense, and should have the best possible technical direction.

I hope that after you have heard more in detail from the Atomic Energy Commission, your organization will find it possible to undertake this task. In my opinion you have here an opportunity to render an exceptional service in the national interest.

I am writing a similar note direct to Dr. O. E. Buckley.

Very sincerely yours,

Harry Truman

Mr. Leroy A. Wilson,
President,
American Telephone and Telegraph Company,
195 Broadway,
New York 7, N. Y.

LEGISLATIVE PROPOSAL FOR CONSIDERATION OF CLAIMS BY PERSONS EXPOSED TO RADIATION FROM ABOVE GROUND NUCLEAR WEAPONS TESTING

I. PROPOSAL FOR VETERANS

Introduction

The proposal for veterans provides a structure through which the case of a veteran who has been exposed to radiation from atmospheric nuclear testing, but is ineligible for disability or death benefits because his illness is not considered service related, would receive special review. The proposal, described in detail below, establishes an independent, five-person trial panel within the Department of Veterans Affairs (DVA) to review cases denied by the Department. Veterans would be afforded certain presumptions related to radiogenic diseases. Payment of fees for attorneys and expert witnesses of successful claimants would be covered. The relief provided for veterans through this proposal and P.L. 100-321 would be exclusive. Benefits would be made retroactively depending upon the circumstances. The DVA would establish an outreach program to inform affected veterans of the new procedures. The panel is authorized to recommend additions to the list of diseases presumed to be service-connected.

1. Independent Review Panel

Composition: The Secretary of the Department of Veterans Affairs appoints five individuals to an independent review panel. The panel would consist of a veteran exposed to radiation from atmospheric nuclear testing, a physician, a scientist, an experienced DVA hearings officer, and a member of the general public. The Secretary would appoint additional panels of like composition, as needed, to assure adjudication of claims within six months of initial administrative denial. Panel members would serve fixed terms. Once the period for claims or appeals had expired the panel(s) would be dissolved.

Jurisdiction: The panel(s) would review, de novo, appeals by veterans whose claims are based on exposure to radiation from atmospheric nuclear testing and where the DVA administrator denied the claim because: (i) the veteran did not participate in a radiation-risk activity, (ii) the veteran does not suffer from the claimed illness, (iii) the illness was not caused by the participation, or (iv) the illness was not manifested within the statutory period.

The panel would follow customary rules of evidence and would have the power to reverse the decision of the administrator and to

grant veterans benefits on a finding that the standards of 38 U.S.C. section 310 are satisfied. An adverse decision of the administrator would not have a precedential effect, but could be admitted as evidence and accorded such weight as the panel deems appropriate. (See Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)).[1]

Appeals from the decisions of the panel would be allowed only by the veteran or surviving family and would be directed to the United States Court of Veterans Appeals established in P.L. 100-687. The scope of review and proceedings would be in accordance with that law.

2. Presumptions

Exposure: The proposal would use the definitions of "radiation-exposed veteran," and "on-site participation in a test...," as specified in P.L. 100-321.

Dosage: A presumption would be made that each veteran received a given dosage of radiation from any test in which the veteran participated. As dosages probably varied from one

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[1]Under current veterans benefits law (P.L. 100-687), the "benefit of the doubt" in closely contested cases is "given to the claimant".

test to another, a level of exposure would be specified by Congress for each test. The specified level would fall within the high end of the known range of actual dosages received by test participants.

The presumption would not foreclose proof that, due to the peculiar facts of participation, the veteran received more than the statutory dose. The government would be foreclosed from proving that a particular veteran received less. The government would establish an office to make appropriate Defense Nuclear Agency (DNA) records freely available to any claimant interested in proving that his dosage was in fact higher than the statutory presumed level. The government contractors would make their records of individual dosages freely available to both DNA and the veterans.

3. Fees

Travel: Reasonable travel costs for attending hearings will be paid for claimants and witnesses.

Attorney: Reasonable fees for attorneys and expert witnesses will be paid to the successful claimants. They will be calculated on an hourly and per case basis subject to a per case cap to be established by Congress.

An ombudsman would be provided to investigate claims of veterans who are unable to afford a lawyer. The ombudsman's only role would be to review the available evidence and then advise the claimant of the likelihood of success should the case be fully prepared and tried before the panel.

4. Exclusive remedy (see Section IV infra.)

5. Provision of benefits

Retroactivity: Any award of benefits under this proposal and also under P.L. 100-321 would be made payable retroactively consistent with the facts found, but such back payment awards would be payable retroactive to the later of (i) the date of onset of the ailment or (ii) the date of enactment of 42 U.S.C. section 2212.[2]

[2]Under existing Veterans Benefits law, claimants ordinarily may not recover "back pay" disability benefits prior to one year before the claim is filed.

6. Outreach

The DVA would conduct an outreach program to contact, within two years of enactment, all veterans exposed to atmospheric nuclear radiation and advise them of the new procedures. A claimant would be eligible to file a claim under this provision within two years after mailing of such notice or two years after the diagnosed onset of their ailment, whichever is later.

The outreach effort would include a search of DVA records of veterans whose claims for benefits on the basis of alleged service-connected radiation injuries had already been turned down. Any new or renewed claims made by such veterans would not in any way be prejudiced by earlier DVA determinations.

7. Revisions

Addition of service-connected diseases: The independent review panel(s) would report annually to the Secretary of DVA who would consult with the Secretary of Labor and together report to Congress on the need for the adoption of additional presumptions of service-connected diseases. Recommendations for addition would be based on new scientific-medical evidence and resolution of claims.

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II. PROPOSAL FOR CIVILIAN EMPLOYEES

Introduction

The proposed relief for civilian employees[3] would be integrated with existing mechanism set forth in the Federal Employees' Compensation Act (FECA). The FECA provides benefits for federal civil servants killed or disabled in the course of, or resulting from, federal employment. It establishes procedures for the processing and adjudication of claims by the Department of Labor.

FECA provides reimbursement for lost wages, disability payments for those suffering permanent impairments, and compensation to survivors. In addition it provides for recompense for the reasonable cost of medical services and vocational rehabilitation.

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[3]In this proposal employees of the federal government and its contractors are referred to collectively as "civilian employees". In addition to traditional civil servants, FECA already applies to such non-civil servants as (i) federal court petit and grand jurors, (ii) unpaid volunteers in DVA hospitals, (iii) Civil Air Patrol volunteers, (iv) members of the Reserve Officer Training Corps, (v) Peace Corps volunteers, (vi) student employees, (vii) members of Volunteers in Service to America, and (viii) members of the National Teachers Corps. (20 C.F.R. section 10.5(a)(11).) The Office of Workers' Compensation Programs ("OWCP") has been established within the Department of Labor to adjudicate all

(Footnote Continued)

1. Review Panel

Composition: The Secretary of Labor appoints five individuals to an independent review panel. The panel would consist of a civilian who participated in the detonations, a physician, a scientist, an experienced Department of Labor (DOL) Office of Workers' Compensation Programs (OWCP) hearings officer, and a member of the general public. The Secretary would appoint additional panels of like composition as needed to assure adjudication of claims within six months of initial administrative denial. Panel members would serve fixed terms. Once the period for claims or appeals had expired the panel(s) would be dissolved.

Jurisdiction: The panel(s) would review, de novo, appeals by civilian employees whose claims are based on exposure to radiation from atmospheric nuclear testing and where the OWCP administrator denied the claim because: (i) the individual did not participate in a radiation-risk activity as a civilian employee of the United States or its nuclear weapons contractors, (ii) he/she does not suffer from the claimed illness, (iii) the illness was not caused by the participation, or (iv) the illness was not manifested within the statutory period.

(Footnote Continued)
claims (i.e. both employee and non-employee claims (under FECA. (20 C.F.R. section 10.2(a).)

The panel(s) would follow customary rules of evidence and would have the power to reverse the decision of the OWCP, and award Federal Employees' Compensation Act (FECA) benefits to employees and/or their survivors on a finding that the standards of proof under the FECA are satisfied.[4] An adverse decision of the OWCP administrator would not have any precedential effect, but could be admitted as evidence and accorded such weight as the panel deems appropriate.

Appeals from the decision of the panel(s) would be allowed only by the civilian employee or surviving family, and would be directed to the Employees' Compensation Appeal Board (ECAB) within the Department of Labor, with all such proceedings and the scope of review as set forth in the FECA and existing DOL Regulations.[5]

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[4]Under FECA, applicants for benefits have the burden of establishing a causal relationship.

[5]ECAB is the highest appellate tribunal within DOL for FECA claims. (ECAB determinations are not normally appealable. The proposal suggests adopting a special appeal provision patterned after 38 U.S.C. section 4092, as enacted by P.L. 100-687, to permit appeals to the U.S. Court of Appeals for the Federal Circuit.)

2. Presumptions

Exposure: The proposal would adopt definitions for "radiation-exposed civilian employee" and "on-site participation in a test" consistent with the definitions of "radiation-exposed veteran" and "on-site participation in a test" already in P.L. 100-321.

Dosage: A presumption would be made that each civilian received a given dosage of radiation from any test in which he/she participated. As dosages probably varied from one test to another, a level of exposure would be specified by Congress for each test.

Inasmuch as military participants at the detonations were frequently positioned closer to ground zero than were the civilian employees, and were not always furnished with the same items of personal radiation protection, statutorily presumed dosage levels for veterans would probably exceed the presumed dosages for civilians. The specified levels would fall within the high end of the known range of actual dosages received by civilian test participants.

The presumption would not foreclose proof that the employee received more than the statutory dose due to the peculiar facts of his participation, but the government would be foreclosed from proving that a particular civilian received less. The government would establish an office to make pertinent Defense Nuclear Agency

(DNA) records freely available to any claimant interested in proving that his dosage was in fact higher than the statutory presumed level. The government contractors would make their records of individual dosages freely available to both DNA and the civilians.

Diseases: If civilian employees develop any of the thirteen cancers listed in P.L. 100-321 within the statutory periods, it is presumed to be sustained while in the performance of his/her employment by the government or its contractor.

3. Fees

Travel: Reasonable travel costs for attending hearings will be paid for claimants and witnesses through the Department of Labor.

Attorney: Fees for attorneys and expert witnesses will be paid to the successful claimants. They will be calculated on an hourly and per case basis subject to a per case cap to be established by Congress.

4. Exclusive remedy (see Section IV infra.)

5. Provision of benefits

Extension of Claim Period: Notwithstanding the statute of limitations usually applicable to FECA claims, a claimant would be eligible to file a claim under this provision within two years of the mailing of notice of the new procedures, or two years after the diagnosed onset of the illness, whichever is later. Any new or renewed claims made by such civilians would not in any way be prejudiced by earlier OWCP or state workers' compensation act denials to grant benefits.

Retroactivity: Any award of benefits under this proposal would be made payable retroactively consistent with the facts found, but such back payment awards would be payable retroactive to the later of (i) the date of onset of the ailment or (ii) the date of enactment of 42 U.S.C. Section 2212.[6]

6. Outreach

Within two years from the date of enactment, the Department of Energy would conduct an outreach program to contact every

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[6]See text accompanying footnote 2.

present and former civilian service employee known, or suspected, to have participated in any of the above ground detonations and advise them of the new procedures.

7. Revisions

Addition of exposure-related diseases: The independent review panel(s) would report annually to the Secretary of Labor who would consult with the Secretary of Veterans' Affairs and together report to Congress concerning the need for the adoption of additional presumptions of exposure-related diseases. Recommendations for addition would be based on new scientific-medical evidence and resolution of claims.

III. PROPOSAL FOR 'DOWN-WINDERS' AND URANIUM MINERS

Introduction

For purposes of equity and consistency this proposal would modify the Hatch Owens bill from the 101st Congress (S.841) with the following changes:

1. The new provision would replace the list of specified diseases in S.841 with the list of thirteen cancers in P.L.

100-321. It would also adopt the 30- and 40-year presumption periods specified in that statute.

2. The exclusive remedy provisions of Section IV infra. would be included.

IV. EXCLUSIVE REMEDY (Suggested Statutory Language)

1. The remedies provided by this proposal and by the Hatch-Owens bill, as appropriate, for injury, loss of property, personal injury, or death shall be exclusive with respect to civil liability of the United States or its contractors arising from any act or omission of the United States or of any contractor in carrying out an atomic weapons testing program, without regard to when the act or omission occurred.[7]

2. For purposes of this section, the term "contractor" includes a contractor, its parent company, or cost reimbursement subcontractor of any tier participating in the conduct of the United States atomic weapons testing program for the Department of Energy (or its predecessor agencies, including the Manhattan

[7]Paragraph (1) is a composite of paragraphs (a)(1) and (a)(2) of 42 U.S.C. Section 2212, with appropriate changes.

Engineer District, The Atomic Energy Commission, and the Energy Research and Development Administration). Such term also includes facilities which conduct or have conducted research concerning health effects of ionizing radiation in connection with the testing under contract with the Department of Energy (or any of its predecessor agencies).[8]

3. The remedies provided by this proposal (and by the Hatch-Owens bill, as appropriate) are not intended to bar state workers' compensation actions if available to claimants. However, the federal government shall receive an offset to the extent a claimant (or his survivors) has or will receive Workers Compensation benefits for the same illnesses, injuries and/or losses.

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[8]Paragraph (2) is copied from 42 U.S.C. Section 2212(d).

BACKGROUND PAPER FOR LEGISLATIVE PROPOSAL

I. HISTORICAL PERSPECTIVE ON NUCLEAR WEAPONS TESTING

1. Time Period

The United States conducted above ground atomic weapons detonations between 1945 and 1963. Hundreds of thousands of American soldiers and employees of the federal government and its contractors (referred to collectively, in this proposal, as "civilian employees") participated in or witnessed these tests. In addition, thousands of residents at nearby locations (known as "down-winders") observed U.S. continental tests at relatively close range and were exposed to the resultant fallout.

It has been 26 years since the United States last conducted an above ground atomic weapons test, and more than 43 years since the first such test. As the participants and observers age, some die each year from natural causes. Others suffer illnesses customarily associated with advancing age, including various cancers, hypertension, and diabetes. Some of these individuals believe that their diseases, particularly the cancers, are associated with exposure to radiation.

2. The Problem of Causation

There is no clear evidence linking exposure to low-level ionizing radiation resulting from the detonations to disabling conditions.[1] Two large scale epidemiological studies of test participant mortality rates were published in the late 1980s.2 In 1985, the National Research Council (NRC) released a mortality study of over 46,000 U.S. atomic veterans who participated in one or more of five U.S. atmospheric test series. The NRC study confirmed the statistically high leukemia rate among test shot SMOKY participants but found no significant excess of leukemia among the participants at any test series other than PLUMBOB or among PLUMBOB participants who were not present at test shot SMOKY. This study found that the atomic veteran cancer mortality rate was only 83.5 percent of the U.S. rate but did not consider any "healthy worker effect." [3]

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[1]H.R. Report No. 100-235 accompanying the bill (H.R. 1811) Public Law 100-321, at page 4.

2Earlier in 1979, the Center for Disease Control released a relatively small study that found 8 leukemia cases among veterans who, in 1957, had participated at test shot SMOKY (one of the shots in the PLUMBOB test series) at the Nevada Test Site. The expected rate of leukemia cases in a group of the same size, drawn from the general population of the United States, is 3.5.

[3]C. Dennis Robinette, Seymour Jablon, Thomas Preston.
(Footnote Continued)

In 1988, the British National Radiological Protection Board released a mortality study of over 22,000 test participants and 22,000 controls, which considered the "healthy worker effect." The United Kingdom test participants had a cancer mortality rate of 80 percent of the rate expected in England and Wales and the United Kingdom military controls had a cancer mortality rate of 83 percent of that rate. The United Kingdom test participants had (relative to the United Kingdom control group) statistically high rates of leukemia and multiple myeloma and statistically low rates of kidney and prostate cancers.[4]

(Footnote Continued)
Mortality of Nuclear Weapons Test Participants.
National Research Council. Medical Follow-up Agency.
Washington, D.C. May 1986.

[4]S.C. Darby, G.M. Kendall, T.P. Fell, J.A. O'Hagan, C.R. Muirhead, J.R. Ennys, A.M. Ball, J.A. Dennis, and R. Doll. Mortality and Cancer Incidence in U.K. Participants in U.K. Atmospheric Nuclear Weapons Tests and Experimental Programmes. National Radiological Protection Board, Oxon England. January 1988.

Notwithstanding these studies, some of the participants and observers, and their surviving families, assert that the illnesses and deaths were caused by the radiation released in the detonations. The vast majority of claims brought by veterans have been denied by the Department of Veterans' Affairs (DVA) because the veterans were unable to prove that the cause of their illness was related to their military service. Suits by civilians have also been unsuccessful due to various legal defenses.

The 100th Congress, in light of the lack of conclusive scientific evidence proving causation and the legal constraints, passed H.R. 1811, legislation providing relief for some veterans, which became Public Law 100-321. This law dispenses with the need to prove a causal link between a veteran's exposure to atmospheric nuclear radiation from weapons testing and contraction of thirteen named cancers. The law provides a presumption that the cancers are service-connected, thus enabling affected veterans to receive death and disability benefits from the DVA. The law does not, however, "represent a judgment that service-related radiation exposure of veterans ... in fact caused any disease."[5]

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5 May 28, 1988 statement of President Reagan accompanying the signing of H.R. 1811, the bill which then became Public Law 100-321.

3. Claims Not Addressed

The legislative solution provided by P.L. 100-321 does not, in the view of some within Congress, provide a complete solution. It provides no relief for veterans who do not suffer from the statutory list of thirteen cancers or whose illnesses are first manifest after the statutory time periods. In addition, it provides no special judicial machinery within the DVA to assure that radiation exposure claims are adjudicated fairly, expertly, and expeditiously. Perhaps most significantly, it provides no substantive or procedural relief for other observers of the above ground atomic weapons detonation, i.e., the civilian employees and "down-winders".

II. LEGISLATIVE CONTEXT

1. Purpose of the Legislative Proposal

The attached proposal is in response to Congressional staff requests for alternatives or modifications to S. 612 and H.R. 1341, bills introduced in the 100th Congress aimed at providing veterans and civilians with an opportunity for review of their claims. It proposes legislation which complements 42 U.S.C. Section 2212[6] by providing relief to veterans, civilian employees, and "down-winders" exposed to radiation from atmospheric nuclear testing.

The proposed legislation would provide review and relief processes for test participants and observers, (or their surviving families) who suffered disabilities or death related to low-level ionizing radiation from above ground nuclear tests. The approach outlined takes into account the fact that judicial review is a key concern expressed by members of these groups. The proposal is

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[6]This section requires substitution of the United States as the sole party defendant in suits against Department of Energy (DOE) contractors arising out of the atomic weapons testing program. It also provides that the Federal Tort Claims Act (FTCA) applies in these cases, but the FTCA provides the United States with a series of exemptions which courts have held immunizes it from liability.
(Footnote Continued)

divided into subsections which describe slightly different remedies for the three distinct groups - veterans whose illnesses are not covered by P.L. 100-321, civilian employees, and "down-winders".

2. Premises of the Proposal

For more than a quarter of a century, this country has not conducted above ground atomic weapons tests. Because of the lack of scientific evidence demonstrating causation, the complexities of the issues, the length of time that has elapsed since the testing took place, and the numbers of litigants who would be involved, litigation could be difficult and protracted for all parties concerned. The nation needs to finally resolve the claims of those who performed special service or were exposed to unique risks in connection with those tests.

(Footnote Continued)
The practical effect of the Feres doctrine, The Federal Tort Claims Act, 5 U.S.C. 8116 (C), and 42 U.S.C. Section 2212, is to preclude any of the observers from recovering civil relief for illnesses they believe were caused by detonation-released low-level ionizing radiation, whatever their proof, aside from, in the case of veterans, those illnesses within the statutory list of thirteen cancers which were manifested within the statutory time periods.

The proposed legislation does not require changes in the FTCA or 42 U.S.C. Section 2212 but instead provides new forms of relief to atomic veterans, civilian employees, and down-winders exposed to radiation.

The attached proposal is based on the following premises: 1) Persons exposed to atmospheric radiation from federal nuclear weapons tests, should receive fair and comparable consideration of their claims. 2) Certain presumptions related to exposure and etiology of disease are appropriate. Proof of fault of the government or contractor would not be required. 3) Nuclear weapons testing is an exclusively federal activity and any remedies for resulting ill-effects are the responsibility of the federal government because the above ground nuclear tests were conducted by the Atomic Energy Commission pursuant to the Atomic Energy Act, with the express consent and direction of the President of the United States.

The enactment of P.L. 100-321 enabled veterans who nad been unable to establish a causal link between their exposure and subsequent onset of disease to receive benefits. The law replaced the need to prove causation with a presumption of service relatedness. Through this presumption the federal government provided benefits to covered veterans; similar relief should be provided to non-veterans.

AT&T

T. R. Thomsen
President
Technology Systems

1 Oak Way
Berkeley Heights, NJ 07922-2727
201 771-2500

August 31, 1989

The Honorable Howell Heflin
Chairman, Subcommittee on Courts
and Administrative Practice
United States Senate
Committee on the Judiciary
223 Senate Hart Office Building
Washington, DC 20510

Dear Senator Heflin:

Enclosed are my responses to the questions posed by the Subcommittee on Courts and Administrative Practice as a follow up to my testimony at the August 3 hearing on S.982, the "Radiation Victims Fair Treatment Act."

The opportunity to offer my views on this important issue is appreciated. We look forward to working with you and the Committee as you proceed with consideration of this matter.

Sincerely,

T. R. Thomsen

Attachment

T.R. THOMSEN
RESPONSES TO FOLLOW-UP QUESTIONS
FROM THE AUGUST 3, 1989 HEARING ON S. 982

1. I understand that AT&T is completely indemnified by the federal government for any damages which might arise from lawsuits derived from a repeal of the Warner Amendment. If that is the case, what is the AT&T interest in this legislation and why are you testifying against a repeal of the Warner Amendment?

A. AT&T's interest in this legislation stems from our unique role as a corporate public servant and our concern for the parties affected by repeal. Without the establishment of an administrative forum to provide an exclusive remedy for legitimate grievances, repeal would benefit neither the government, the contractors, nor the claimants.

For the past forty years, we have overseen the management of Sandia National Laboratories for the U.S. Government on a no-fee, no-profit basis. Our purpose in this role is to help support the nation's defense through the maintenance of a reliable, credible nuclear deterrent. In pursuit of this public responsibility, it has been our goal to manage for excellence. Although AT&T would remain insulated from liability if the Warner Amendment were repealed, we are concerned that such repeal would jeopardize our ability to sustain the requisite level of management excellence at Sandia.

Repeal would place the burden of defending claimants' lawsuits on the National Laboratories and their managing contractors. In the process, it would divert valuable resources away from the national security mission of the Labs, thereby dissipating the effectiveness of a valued national resource.

It would require contractors to stand before courts and juries as surrogates for the federal government and defend the U.S. nuclear weapons testing program. Contractors would be called upon to defend programs that are exclusively federal in nature, and over which they had no authority. AT&T would also be required to explain to shareholders and customers why we, and not the United States, were being held to account for atomic weapons testing.

For the claimants, the consequences of repeal would be equally unsatisfying. They would have to endure lengthy and expensive lawsuits seeking to establish contractor liability, and prove a causal link between their participation in the weapons testing program, their exposure to radiation, and their illness. They would also be subjected to the uncertainties and inconsistencies of the judicial system, with the real risk that no relief would be forthcoming in some instances, and widely variant in others.

In the end, the federal government would have to shoulder the anticipated increases in litigation on its already overburdened judicial system. And it would be required to pay the resulting

costs and damages arising from lawsuits brought against the contractors. Inevitably, the end cost to the taxpayers would be substantially greater.

Since the government's responsibility for all aspects of the nuclear weapons testing program is clear, the litigation that would arise from repeal is not a desirable outcome.

In our opinion, repeal is being sought not because Section 1631 exists, but because claimants have been unable to obtain a forum for their complaints, which they perceive as a necessary step to obtaining relief from the government. In view of the uniformly negative consequences of repeal for all parties, we believe that an administrative approach would provide a more desirable solution for addressing the concerns of claimants.

2. How did you formulate the administrative proposal to compensate radiation victims for their injuries?

A. The administrative proposal in our testimony was jointly developed by AT&T and the University of California, which manages Sandia's sister National Laboratories at Livermore and Los Alamos. In formulating this proposal, we are responding to requests by Congressional staff who expressed an interest in finding an alternate approach to this issue.

We reviewed prior legislation, including Pub. L. 98-542, in which Congress sought to ensure a fair and balanced approach to resolving compensation questions by establishing a general framework for adjudication of exposure claims within the Veterans Administration benefits system.

In addition, we followed the Congressional model established in Pub. L. 100-321, which provided a presumption of service-connected injury to veterans who participated in the nuclear weapons testing program, and who suffer from any of thirteen cancers, entitling them to automatic veteran and survivor benefits.

We drew on the assumptions reflected in the Compact of Free Association (H. J. Res. 187), passed by Congress in 1985, which established a fund to compensate citizens of the Marshall Islands and Micronesia for loss or damage resulting from the nuclear weapons testing program conducted during the 1940s and 1950s.

We also incorporated the provisions contained in S. 841, sponsored by Senator Hatch, which establishes a trust fund to compensate "downwinders" who live in areas affected by nuclear weapons testing.

Our proposal is intended to be a flexible framework from which to develop a detailed legislative solution. We did not include

specific provisions, leaving these details to the judgment of Congress.

3. What are the benefits of an administrative remedy?

A. An administrative remedy provides an optimal approach to all parties involved, and is, above all else, fair. It keeps this issue out of the courts, where recovery is uncertain, costs are high, and the National Laboratories would be sued as surrogates for the government, with the attendant drain on the Laboratories' ability to perform their mission. It gives all claimants a full and equal measure of respect, and permits the government to better manage its costs. It also goes a long way toward satisfying the intense desire of many claimants that the government acknowledge its responsibility for the consequences of its nuclear weapons testing program.

With an administrative approach, relief is more certain and immediate. By extending the presumption of exposure-connected illness established in prior legislation, it removes the need for claimants to prove the complex causal link between their participation in the weapons testing program, their radiation dosage, and their illnesses, thus making it more likely that their financial needs will be addressed.

The administrative approach is more efficient. Claims can be objectively evaluated, centrally administered, and where appropriate, reviewed by an independent panel.

It is also the best use of the government's scarce resources. Costs would be controlled within the limits established by Congress, which can be increased if appropriate. More available funds would go to the claimants rather than to support expensive litigation. In addition, the U.S. court system would be spared the heavy burden of increased litigation if S. 982 were enacted.

Finally, this approach treats all claimants equitably and consistently. It avoids the risk which currently exists that Congress may cobble a patchwork of legislative and judicial solutions to benefit selected claimants -- a framework that could perversely result in the government paying twice, in the courts, and again under various administrative remedies.

4. Some believe the national weapons laboratories occupy a unique position in their relationship with the Federal Government. How does your position differ from that of other private contractors?

A. As managing contractors for Sandia National Laboratories, AT&T and Sandia Corporation perform work that is inherently governmental in nature. Only the federal government sets the

policy, establishes the program, makes the decisions, and controls the activities and circumstances affecting these activities. As recent court cases have acknowledged, the National Laboratories are merely the instruments of national policy in this entirely governmental task.

Because work under the contract involves unusual and unpredictable risks not associated with conventional commercial government contracts, AT&T's contract with DOE provides that AT&T and Sandia Corporation are fully indemnified by the United States for all liabilities.

We operate the Labs for no fee and no profit. Neither AT&T nor Sandia Corporation has any financial interest in the physical laboratories or ownership interest in the properties. All assets and properties at the Labs are owned by the United States. All funds to operate the Laboratories are drawn directly from government accounts.

As a result of these unique conditions, a special relationship exists between the government and the Laboratories.

5. If S. 982 is enacted, weapons laboratories will again be involved to a limited degree in the litigation process. Do you believe this limited involvement will have an adverse impact upon your ability to serve the United States? If so, how so, and to what extent?

A. We believe that if S. 982 were enacted, AT&T's and Sandia's involvement in the resulting litigation process would not be limited, even though all damages and costs arising from litigation would be borne by the federal government under our contract with the Department of Energy,

As government contractors, AT&T and Sandia would be required to defend in court not only our actions, but the actions, decisions, and policies of the United States as they related to the nuclear weapons testing program during the 1940s, 1950s, and 1960s. And because we were merely the instrument of those national policies, we lack the expertise - military, international, security, diplomatic, or political - as well as access to specially classified documents that would be essential to an effective defense of government decision-making in these matters.

The burdens associated with this defense would be extensive. In addition to the cases pending against us before Section 1631 was enacted, which would in all probability be reactivated, we would expect significant numbers of new cases to be filed throughout the nation by all classes of claimants, including veterans, civilian employees, and residents of the regions affected. It is not possible to predict what juries would conclude about the wisdom and propriety of these political and military decisions.

As court cases proceeded, we would have to provide the appropriate subject matter experts to defend these lawsuits. This defense would divert valuable human and financial resources away from the primary mission of the Laboratories, including the implementation of new programs based on the changing goals and objectives of U.S. foreign policy. As occurred in the past, we would have to redirect the efforts of many highly skilled technical employees to defend radiation cases. The costs of defending these lawsuits would come from program funds that would be better spent on the critical systems work that contributes to a safe and reliable national nuclear deterrent capability and the preservation of the nation's defense readiness.

Finally, the scientists, engineers, and technicians at the Laboratories have always believed that they perform a vital service for the nation and the world, and that they have the complete support of the U.S. government agencies which sought their talents. If we again had to defend radiation litigation, with its attendant attacks on individual reputations, it would be increasingly difficult for the Laboratories to compete for and retain the highly qualified scientists and engineers required to accomplish the challenging goals placed on Sandia by the government. This situation would surely challenge the established record of managing the Laboratories for excellence.

Senator HEFLIN. Dr. Kane.

STATEMENT OF DR. KANE

Dr. KANE. Thank you, Mr. Chairman, for allowing the University of California to testify on this very important legislation.

In accordance with your wishes, I understand my formal remarks will be placed in the record, and I will summarize very briefly two points that I believe are most essential to our argument.

The first of these is the unique relationship between the University of California and the Federal Government; and the second will be some of the merits of a possible administrative remedy versus allowing these cases to be settled in court.

The University of California is the oldest contractor in the system. It goes back to 1943 when it took over the responsibility during World War II for administering the Los Alamos Laboratory. I'd like to explain what the University does and what it doesn't do in this relationship.

What it does is lend its expertise to this uniquely Federal operation of designing and testing nuclear weapons; by law, the Federal Government is the only organization that can do this. It assures that the work is of the highest quality, and it operates it laboratories in as open a way as it possibly can, considering the sometimes classified nature of the subject matter.

What it does not do—it is not a contractor in the usual sense. It does not make a product and sell it to the Federal Government. We do not profit from this relationship and have not for 45 years. The entire enterprise in which we are involved is in the hands of the Federal Government. The Government sponsors the work, provides the guidance and the resources, and authorizes all activity.

For example, for the nuclear tests under consideration today, they were entirely under Government control and culminates in the fact that the President of the United States must authorize every nuclear test. The University did not, for instance, command the troops and the warships; we did not establish the radiological standards that were invoked by the Federal Government. We did not monitor for radiation and exposure to other than our own employees. This was all done by the Federal employees.

The second part of my testimony—well, you might ask, why does the University do this? And because my time is so short, I won't go into the details, but I'll give it in two words: It does it as a public service. I have sat through the debate of the regents each time they have renewed the contract, and it ultimately boils down to the fact that they think by operating these laboratories they are providing the citizens of the United States with a service.

The second half of my testimony has to do with a comparison of the two possible ways you could handle this. The issue is now in your hands, and that is very appropriate because it is largely a political issue. What you have to do has to be compassionate, and it has to be fair. By that, I mean it has to be fair to the claimants above all, because these are sick people in many cases; it has to be fair to the contractors, and it has to be fair to the taxpayers of the United States.

In my view, you have two options. You can repeal 1631 outright, which will throw these cases into the courts, or you can invoke or legislate some kind of an administrative remedy—and needless to say, we prefer the second.

Just for contrast, if 1631 is repealed, the claimants will have to prove the University is responsible and at fault—a very difficult task in the light of how much of these responsibilities are those of the Federal Government. They will also have to prove that their illness was caused by the radiation. I will answer to only this latter aspect, to illustrate the obstacles of a court trial for these is really immaterial in many ways to how these are settled, but I want to illustrate the obstacles.

There has been extensive epidemiology done on people exposed, both done by the United States and by the British—very large tests. Over 46,000 U.S.-involved were studied, and in the case of the British, 23,000. I want to emphasize that these studies were not done by the Department of Energy or by the University of California. The studies were done by the National Research Council, which is organized and run by the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine.

What they do when they do a test like this is to appoint experts who are not involved. They have studied this case, and their conclusions, to abridge them, are that the overall death rate of the 46,000 participants in the nuclear tests were 83 percent that of the public of the United States. In other words, on the average, the participants were healthier than the general public.

Let me just read—as far as the incidence of cancer, out of the 13 kinds of cancer that are known to be radiation-induced, only one of these, leukemia, had a suggestion of an elevation in rate—let me read their final paragraph:

> The total body of evidence reviewed could not convincingly either affirm or deny that the higher than statistically expected incidence of leukemia among smoking participants is the result of radiation exposure. However, when the data from all the tests are considered, there is no consistent or statistically significant evidence for an increase in leukemia or other malignant disease.

I think in contrast, the administrative would have the virtue of being compassionate. The benefit of the doubt, if Congress desires, can be given to those who have been exposed. It would be consistent with public legislation already passed and the Hatch proposal. For the 13 cancers, no proof of causation would be required. No proof of dose would be required. The dose would be assumed if the person was at the place at the time. And I believe the relief would be much more rapid. It would be fair to the contractors in that there is no need to prove them responsible for acts for which they were not responsible. And finally, it would be fair to the taxpayers.

So in summary, the University urges that 1631 not be repealed unless repeal is coupled with an exclusive administrative remedy, perhaps patterned after that suggested jointly by University of California and AT&T.

Thank you for allowing me to present the University's views.

[Prepared statement of Dr. Kane and answers to questions submitted by Senators Heflin and Thurmond follow:]

STATEMENT TO THE SUBCOMMITTEE FOR COURTS AND ADMINISTRATIVE PRACTICES OF THE SENATE JUDICIARY COMMITTEE

ON S.982

WHICH WOULD REPEAL SECTION 1631 OF THE DEPARTMENT OF DEFENSE AUTHORIZATION ACT OF 1985

AUGUST 3, 1989

JAMES S. KANE
SPECIAL ASSISTANT FOR LABORATORY AFFAIRS
THE UNIVERSITY OF CALIFORNIA

TESTIMONY OF DR. JAMES S. KANE
SPECIAL ASSISTANT - LABORATORY AFFAIRS
UNIVERSITY OF CALIFORNIA

AUGUST 3, 1989

I wish to thank the Chairman and this Subcommittee for the opportunity to testify about a matter of substantial concern to The University of California. We strongly oppose enactment of S.982 now being considered by this Subcommittee. Our reasons are:

1. the Bill as drafted will not accomplish the desired end, that of fairly compensating claimants who may have been injured as a result of radiation exposure from this nation's nuclear weapons testing program;

2. the effect of the Bill would require plaintiffs to litigate against the University and its laboratory scientists about decisions made by the United States Government;

3. the Bill would result in a diversion of University and Laboratory personnel and funding from laboratory scientific programs to litigation support.

In addition to this Bill, Congress is presently investigating other approaches to the compensation of atomic testing claimants. The ultimate objective of all of these approaches is to adequately compensate claimants who may have been injured as a result of their radiation exposure from the atmospheric nuclear testing program in a manner which is fair, timely and cost effective. We strongly endorse that objective and believe equally strongly that an administrative remedy provides the best way of satisfying that objective.

S.982 assumes that the best way to screen for those who should be compensated is via civil tort actions. As a fact finder in complicated cases, the civil jury trial system is extraordinarily expensive, time consuming and inefficient. Proof of causation will be central to these cases. At the current level of scientific understanding it is impossible to isolate the cause of an individual cancer hidden among

thousands of naturally occurring cancers. (See Appendix I).

Not only would the causation issue be a formidable barrier to success in court, in addition, civil trials, particularly jury trials, involve extended litigation discovery and preparation.

The issue of alleged contractor negligence will be equally difficult for the claimant. It is unfair to authorize tort actions that focus on the acts of the nuclear weapons contractors. From the earliest days of the Manhattan Engineer District, there has been a well understood relationship between the federal government and the nuclear weapons contractors concerning the United States nuclear weapons program. The decisions that resulted in radiation exposures from nuclear tests have always been made by federal officials, not contractor personnel.

Nuclear weapons testing is a uniquely federal activity. Clearly, and appropriately, the federal government strictly controls such testing and programmatic decisions. Each and every nuclear test is authorized by the President of the United States. A senior military officer or a senior federal official has always been in formal command and actual control at each and every nuclear test. Contractor personnel who supported such tests functioned within the government's test organization structure; they reported to, and received their direction from, the government Test Manager. The combat soldiers and warships of this Nation, involved in such tests, were not commanded or controlled by contractors. It was the federal officials who initiated and integrated the medical research concerning radiological hazards and set the exposure limits for military personnel at tests.

Whether it is appropriate for juries to second guess senior federal decisions, decades after these decisions were made, seems questionable. But to divert the focus to the actions of weapons contractors, who did not make the relevant decisions, is even more questionable and is not a rational means of providing compensation.

In light of the lengthy period required for trial resolution, plus the causation and liability problems, the tort approach is inappropriate and inadequate. Further, authorizing a near endless stream of tort cases would be an expensive undertaking and one unlikely to produce uniform and equitable results.

A less adversarial system is necessary. We suggest that a "no-fault" administrative approach is the best way to meet the Congressional objective. Such an administrative approach could be both systematic and predictable. While the civil jury system promises to be expensive and time consuming with no guarantee of recovery even to deserving claimants, the performance of an administrative system is under the supervision of the Congress and subject to its review. Another advantage of an administrative approach is the efficiency and rapidity with which such an approach could operate.

University witnesses have testified before several different Congressional Subcommittees in support of an administrative remedy approach. In March, responding to Congressional staff requests for specific alternative approaches, AT&T and the University proposed an administrative remedy that addressed military and civilan test site personal as well as "downwinders". This proposal is discussed in more detail in the AT&T written testimony presented today. We suggest that such an administrative approach could form the basis for a realistic and equitable remedy. Enactment of S.982 would accomplish the opposite.

Thank you very much for your time and attention.

APPENDIX I

The United States' atmospheric nuclear testing program ran from the latter part of the 40s until the early part of the 60s; we are over 30 years away from the mid point of that testing. Over 200,000 servicemen took part in that testing program. To this number might be added several hundred thousand civilians, both test site employees and "downwinders".

Starting in 1979, the Defense Nuclear Agency (DNA) undertook detailed analyses of decades of records focused on servicemen involved in the nuclear testing program. Since radiation dose exposure records were not complete, DNA conducted a large number of dose reconstruction and exposure estimates. Based on available dose records and such estimates, DNA has calculated average atomic veteran exposures of about 1 Rem; less than 2% of the participants had exposures as high as 5 Rem.[1]

There has been great interest in such DNA efforts both by the federal government and by potential atomic veteran claimants. This potential claimants group is large and will continue to increase as that group ages. The natural mortality rate of cancer is about one in six. The incidence rate of cancer is about twice the mortality rate. Hence, over 70,000 "atomic veterans" will eventually be stricken by cancer and over 35,000 will die from some form of that disease, even if the nuclear testing radiation had no effect at all.

As a practical scientific limitation, there never has been and probably never will be an epidemiology study that will prove conclusively that a relatively small amounts of additional ionizing radiation to adult humans actually causes any increase in cancer rates.

---

[1]/A special committee convened by the National Research Council ("Review of the Methods Used to Assign Radiation Doses to Service Personnel at Nuclear Weapons Tests" [1985]) found that the estimations of external dose were "reasonably sound" and that the internal dose was probably overestimated. Obviously, reconstructed doses are subject to challenge by advocates of one side or the other. But the federal government has spent years and millions of dollars worth of effort to generate these estimates, and such estimates represent the best available source of data for rationally scoping the compensation problem.

The study and control populations would have to be in the multimillions to deal with the background "noise" of random variations in naturally occurring cancers and the complexity of human biological responses. In addition, when dealing with smaller amounts of radiation, natural exposure variances confound the study. For example, a soldier transferred from the sea coast to a duty station in Colorado would, in ten years, experience an additional 1 Rem of radiation exposure. Individuals living in areas with higher natural radon from soils beneath their houses could experience additional radiation exposures of 1 Rem in 5 to 10 years.

The opinion of many scientists who have studied the problem is that radiation risk is, at most, linear with dose at low levels. The linear assumption indicates that the percentage increase, associated with a 1 Rem average exposure to adults, would be a small part of 1%, and it would be impossible to determine precisely which cancer death, of many cancer deaths, was actually caused by that small exposure.

Several epidemiology studies have focused on atomic veterans and demonstrate the difficulties in establishing causation links. In 1979, a preliminary report from the the Centers for Disease Control indicated that eight cases of leukemia had been identified among 3,224 U. S. atomic veterans who had participated in a specific atmospheric nuclear weapons test (code named SMOKY) which was part of the 1957 test series. This represented an excess of 4.5 cases over the 3.5 expected at U.S. general population rates. No other group of cancers occurred at a greater rate of incidence than that of the unexposed population. It was impossible to conclude whether the apparent enhancement of leukemia incidence among the participants of Smoky was real, or was an artifact of the small number of cases of this disease found. This study stimulated the DNA dose reevaluation and information program for U.S. atomic veterans mentioned earlier.

In 1985, the National Research Council (NRC) of the National Academy of Science released a mortality study of 46,186 U.S. atomic veterans who had participated in one or more of five test series. The series studied were UPSHOT-KNOTHOLE (1953) and PLUMBBOB (1957) at the Nevada Test Site, and GREENHOUSE (1951), CASTLE (1954) and REDWING (1956) which were

conducted at the Pacific Proving Ground. The NRC study confirmed the enhanced leukemia rate among SMOKY participants but found no excess of leukemia among the participants at any test series other than PLUMBBOB or among PLUMBBOB participants who were not present at SMOKY. No other form of cancer was found among the participants at the several test series in excess of that of the U.S. general population rates. This National Research Council study found that the overall atomic veteran cancer mortality rate was only 83.5 percent of the U.S. rate. The study design did not consider any possible "healthy worker effect."

In 1988, the British National Radiological Board released a mortality study, which did consider the healthy worker effect. The U.K. study examined mortality rates for 22,347 U.K. military and civilian participants in U.K. atmospheric tests and 22,326 U.K. matched controls who had not participated in the tests. Mortality rates from leukemia and multiple myeloma were somewhat higher in the U.K. test participants; mortality rates for cancer of the prostate and cancer of the kidney were somewhat higher in the U.K. control group. Overall, the cancer mortality rate was slightly lower (relative risk = .96) in the U.K. test participant group than in the U.K. control group. The U.K. test participants had a cancer mortality rate of 80% and the U.K. controls had a cancer mortality rate of 83% of the general population rate expected in England and Wales.

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OFFICE OF THE PRESIDENT
BERKELEY, CALIFORNIA 94720

September 13, 1989

The Honorable Howell Heflin
Subcommittee on Courts and
Administrative Practice
223 Hart Senate Office Building
Washington, D.C. 20510

Re: Responses to Follow-up Questions From the August 3, 1989 Hearing on S. 982

Dear Senator Heflin:

Following my August 3, 1989 appearance and submittal before your subcommittee, I received four further questions from the subcommittee and two from Senator Thurmond. Enclosed are my responses to each of those questions. Should you or another member of your subcommittee or staff have any additional questions for the University, I'd be pleased to review and respond to them.

Thank you for your courtesy during my attendance and your patience in this response.

Sincerely,

James S. Kane
Special Assistant

nfm

Enc.

cc: Senator Thurmond, w/enc.

J. Kane's Responses to Follow-Up Questions
From the August 3, 1989 Hearing on S. 982

Question 1

You indicate in your statement that you believe that this bill will not result in fairly compensating victims of radiation exposure. Why do you hold this belief?

Response:

Enactment of S. 982 will result in a step backwards for all the parties involved in the issue of fair compensation for claims of injuries from weapons related radiation exposures. The current state of scientific knowledge clearly indicates that, if these cases return to court, the majority of plaintiffs will not prevail because they will be unable to establish the legally required casual link between their radiation exposures and their cancers. Of the plaintiffs that do prevail, the results will vary substantially, not necessarily because of the merits of the cases, but because of the nature of the judicial tort system. Thus, claimants with the same or similar factual circumstances will receive widely different results, brought about in lengthy and costly independent proceedings in a judicial system which is already overburdened. The University therefore submits that enactment of S. 982 will not result in fairly compensating victims of radiation exposure.

Question 2

Our nation's court system is able to handle many complex and difficult issues. What leads you to believe that the courts are not the proper forum for resolving this dispute?

Response:

This nation's court system is overburdened, inefficient and costly. The fact that the judicial system handles many complex and difficult cases is more a consequence of the lack of suitable dispute resolution alternatives than it is a preference for formal legal proceedings. More and more people involved in the judicial process have come to understand the benefits of handling disputes without resorting to the court system. Arbitration or administrative proceedings or other similar mechanisms are recognized as preferable to trial by many people, including attorneys on both sides and judges. This preference has, in fact, been recognized by Congress in its passage of several pieces of legislation dealing with the same issues surrounding S. 982. (See, e.g., Radiation-Exposed Veterans Compensation Act of 1988, P.L. 100-321; Veterans' Dioxin and Radiation Exposure Compensation Standards Act, P.L. 98-542; Veterans' Health Care Amendments Act of 1983, P.L. 98-160; Veterans' Health Care, Training, and Small Business Loan Act of 1981, P.L. 97-72). The University submits that Congress should continue this course of action and that the benefits of an administrative remedy

substantially outweigh returning these cases to the court system. Such a remedy would provide claimants a full and fair opportunity to present their claims expeditiously without incurring substantial attorneys' costs and inconsistent results, while at the same time allowing the government to manage the process and make the most appropriate use of the public's money.

Question 3

Would you provide some details of the proposal which you have circulated to the radiation victims' groups? How many people would your proposal affect? How much would it cost?

Response:

The University of California worked closely with AT&T in preparing the proposed administrative remedy included in the submittal of Mr. Thomson, AT&T Technologies, in his appearance before you. That joint proposal is the one referred to in my submittal and previously circulated to the involved claimant groups. It would be speculative for the University to estimate the number of persons the administrative proposal would affect or how much it would cost. It is our opinion that the proposed administrative process would cost substantially less than the S. 982's proposal to repeal 1631 and allow a plurality of protracted and potentially inconsistent lawsuits. The full cost of the administrative remedy process rests with Congress and

depends upon the language of the provisions enacted, for example, the nature and extent of the presumptions favoring claimants, the relief available, and the outreach program would affect the number of persons included and the costs of the program.

Question 4

Do you believe the Federal Government should bear all of the responsibility and blame for the exposure of thousands of people to radiation as a result of atomic weapons testing?

Response:

Yes. The responsibility for radiation exposures arising out of the United States weapons program rests entirely with the Federal Government. The decisions and acts upon which the claimants in these cases predicate responsibility--the decisions to conduct nuclear tests, the location of the test series, the operations of individual tests, the assessment of risks to test participants--were all decisions left to the discretion, supervision and control of federal officials. The University did not make nor can it defend such decisions. The University assisted the United States in this program by management of the laboratories as part of its public service mission. The University submits that Congress must continue to recognize the federal nature of the weapons program and continue to recognize the government's responsibility for that program as it did when it passed the Warner Amendment.

J. Kane's Responses to Senator Thurmond's Follow-Up Questions

Question 1

Some believe that the national weapons laboratories occupy a unique position in their relations with the Federal Government. How does your position differ from that of other private contractors?

Response:

The extraordinary nature of the United States nuclear weapons testing program and the significant effect it has had on this country's national defense and security have mandated from its outset a unique relationship between the Government and the University of California. The Atomic Energy Acts of 1946 and 1954 were passed to ensure that the control and supervision of this purely governmental function would always remain in the hands of the United States. There is no question that the University of California has always acted under the authority of express statute and under the direct supervision and control of the United States in carrying out its role in the Government's weapons testing program.

Most private contractors deal with the Government on a for profit basis. The University of California manages the laboratories solely as a part of its public service mission. The

University's participation in the United States weapons testing program was at the specific request of the Government in furtherance of a national policy deemed critical to the nation's defense by the elected leaders of the Executive and Legislative branches. The University makes no fee or profit from its management activities and because of the unique federal activities in which the laboratories are engaged, the University is fully indemnified for any claims or losses associated with its management activities.

As a result of the history and nature of the University's assistance to the Government, there exists a unique relationship between the University and the Government, a relationship founded on mutual trust and cooperation.

Question 2

If S. 982 is enacted, weapons laboratories will again be involved to a limited degree in the litigation process. Do you believe that this limited involvement will have an adverse impact upon your ability to serve the United States? If so, how so, and to what extent?

Response

If S. 982 is enacted, the involvement of the University of California in these lawsuits will be anything but limited--it will be a substantial undertaking adversely affecting important

scientific programs draining away program dollars and misdirecting valuable human resources.

Prior to the enactment of section 1631 (the Warner Amendment) the University was faced with an ever increasing number of lawsuits arising out of its participation in the United States weapons testing program. These lawsuits were of great concern and the University argued to the Department of Justice that the presence of the United States as a defendant would have a profound impact on the dynamics of the litigation. The focus would then shift as it should be from the activities of the University to the United States, the party responsible for the weapons testing program. The University viewed 1631 as an important and necessary step by the United States in fulfilling its obligations to the University with regard to its management of the Department of Energy laboratories.

At this point in time, if the University is again named as a defendant in these actions, a serious public misperception will be generated. This misperception will be that the testing of nuclear weapons was something other than a strictly federal responsibility. To allow these cases to proceed against the University and other contractors would foster further confusion and misunderstanding about the governmental nature of the program. This is particularly true now that 1631 has been scrutinized and upheld in federal court.

It is the University's position that for the purposes of civil litigation arising from nuclear weapons testing, the University of California and the National laboratories it operates must not be placed on trial because they assisted the United States in the defense program of the nation. To do so will adversely affect both the University's management and the scientific work at the laboratories.

Senator HEFLIN. We will submit questions in writing to this panel, and will conclude the hearing at this time.

Thank you very much.

Mr. THOMSEN. Thank you, Mr. Chairman.

Dr. KANE. Thank you.

[Whereupon, at 3:07 p.m., the subcommittee was adjourned.]

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

Edward "Victor" Fenton
Regional Vice President
Executive Board Member

NATIONAL ASSOCIATION OF
RADIATION SURVIVORS

656 Boulevard, N/E
Orangeburg,
South Carolina 29115

Phone 1-803-534-7707

April 20, 1989

Statement of Edward V. Fenton to the Department of Energy, in regards to the scoping hearing for the Environmental Impact Statement, addressing the restart of the Savannah River Plant's K, L, and P Reactors.

As a victim of 1 Atom Bomb and 4 Hydrogen Bombs, that were detonated in the South Pacific in environmental tests, I speak out against the restarting of the K, L. and P, Reactors. I know of the deceit and lies that the Dept. of Defense and the Atomic Energy Commission (now the Dept. of Energy), have told and also the misinformation and disinformation that has been committed in the various policies of the DOL and the DOE.

Therefore through this statement, I am directing this information not only to the DOD and the DOE but mainly to the citizens of South Carolina, the Press that is here today and to the citizens of Aiken and surrounding towns from which the nuclear workers come daily to work at the Savannah River Plant. I shall try to documentate and give my sources of information so that anyone that desires can verify this information that, I present at this time.

First I will give information from the Report prepared for the use of the Committee on Interstate and Foreign Commerce, United States House of Representatives and the Subcommittee on Oversight and Investigations dated August 1980 and titled "The Forgotten Guinea Pigs", a report on health effects of low level radiation, sustained as a result of the Nuclear Weapons Testing Program conducted by the United States Government. This committee held hearing in the 96-th Congress, 2nd Session and I would like to type the findings of this committee. For those that desire this report, write the U.S. Govt Printing Office in D. C. and askfor Committee Report Print 96-1FC 53.

Page 30 titled Conclusions:

(1) An irreconcilable conflict existed within the Atomic Energy Commission between the competing functions of (a) promoting the development of nuclear systems and technology and (b) controlling their safe production and use;

(2) as a result of these conflicting functions, the Commission chose to secure, at any cost, the atmospheric nuclear weapons testing program rather than to protect the health and welfare of residents of the area who lived downwind from the site;

(3) as a result of its greater interest in pursuing the development of nuclear weapons systems, the AEC failed to pursue impartial scientific

South Central Region
Alabama Mississippi
Florida North Carolina
Georgia South Carolina
Louisiana Tennessee

research on the health hazards posed to the downwind residents;

(4) these and subsequent scientific studies of the health effects on the downwind residents, which indicate an unusually high incidence of leukemia and thyroid cancers, clearly demonstrate the need for the federal government to conduct and to support research to determine the actual health impact on the downwind residents; and

(5) the conflict between promoting nuclear power and controlling its safe production and use continues today in the AEC's successor agencies, the Department of Energy, the Department of Defense, and the Nuclear Regulatory Commission---- and this conflict has been compounded by placing the lion's share of funds for RADIATION HEALTH RESEARCH in these three agencies; the result is to encourage a bias, or an appearance thereof, in the results of such research.

RECOMMENDATIONS

Based on the evidence presented to the Subcommittee as well as the conclusions reached therefrom, the Subcommittee recommends that:

(1) the Department of Health and Human Services; the Environmental Protection Agency; the Occupational Safety and Health Administration; and other appropriate health-related agencies be given primary responsibility, and funding authority to conduct radiation health research, with full access to all government information bearing upon any issues concerning health effects from radiation exposure; and

(2) the government undertake the necessary radiation health research and continue to support such on-going studies as those undertaken by the University of Utah and proposed by the States of Utah, Nevada and Arizona so as to determine the actual health hazards posed to the downwind residents by the atmospheric radioactive fallout emitted from the Nevada Test Site.

- -

I have typed this from the committee report and I am sad to say, that in my mind not one of the recommendations has been implemented. The DOE and the DOD still fund the various laboratories and grants to various institutions. They continue to be biased in favor of nuclear production. They refuse to reveal documents which are requested; even under the freedom of information act. They do not wish to admit..... they exposed their own servicemen in the Armed Forces, their own citizens and especially the nuclear workers.

- -

In the summary Conclusion of this Report, I would like to type the last paragraph:

"The greatest irony of our atmospheric nuclear testing program is that the only victims of U. S. Nuclear Arms since World War II have been their own people. The Subcommittee believes that legislation should be passed that provides prompt and adequate compensation for the victims of this program. In addition, the Subcommittee believes that similar problems can best be avoided in the future, if the responsibility for protecting the people is given to an agency whose main mission is to assure public health, not..... TO ADVANCE NUCLEAR DEVELOPMENT!

To the Citizens of Aiken and to all South Carolinians, I say that you were also exposed to the Fallout from Nevada from Nuclear Testing. The winds carried it to the southeast and the northeast. The heaviest fallout fell on Mississippi and in the New York areas. However fallout was documentated in South Carolina and if anyone wants this documentation I can produce this.

I am attaching a article that was printed in Science News dated Jan 2, 1988 Volume 133. The article is from Louis G. Williams, Emeritus Professor of Ecology, University of Alabama. I would quote a portion of this article:

> "In the late '50's and'60's I conducted research on samples from many major U. S. Rivers. This included both water samples and plankton samples that received fallout from western bomb testing. Also, samples from the Tennessee, Clinch and Savannah Rivers were commonly found to be HIGHLY CONTAMINATED..... with both isotopes of uranium and their daughter, radon, which was based on emission of alpha particles but not gamma radiation. Many reports include alpha subatomic particles as radiation. I do not include alphas as radiation, but they are ionizing materials. THESE IONIZING MATERIALS WERE TRACED TO ATOMIC ENERGY COMMISSION AND DEPARTMENT OF ENERGY OPERATIONS AT THE OAK RIDGE NATIONAL LABORATORY AND THE AEC AND DEPARTMENT OF ENERGY SAVANNAH RIVER PLANT NEAR AIKEN, SOUTH CAROLINA!

The point I am making is that the Savannah River has been highly contaminated with ionizing radiation since the 50's and 60's. Dr. Williams confirms this. I additionally, if I had space could detail from documentated sources now 500 tons of nitrates are flushed by groundwater to surface streams annually. Source of information is titled "The Deadly Defense".

From "The Deadly Defense" it states; thirty million gallons discharged annually must after all, go somewhere. Tritium accounts for 99% of the radioactivity that reaches the Savannah River. Of this, two thirds comes from the seepage basins and one third from direct releases to on-site streams. Site surface streams are contaminated with tritium levels up to 750 times greater than the Environmental Protection Agency's public drinking water standard.

Additionally, substantial leaching of the burial grounds and surface impoundments causes severe contamination of the shallow aquifers and groundwater, thus endangering the Tuscaloosa Aquifer used by Atlanta. Tritium, technetium-99 and iodine 129 have migrated outside the burial ground boundary. Tritium in the groundwater is over 100,000 times the public drinking water standard. Contamination of the Tuscaloosa aquifer by toxic chemicals (solvents) was also detected by the State of South Carolina in 1983, although known by DuPont since 1981.

I'll just state of one release of radiation listed as an accident. On May 2, 1974, 180,000 curies of tritium oxide, tritiated water, were released to the air in 1.5 minutes. In Dec. 1975, 480,000 curies of tritium gas were released to the air in four minutes. From a human health perspective, the 1974 release was more significant because tritium-contaminated water behaves like water vapor, and is more easily incorporated into skin than tritium gas, which is like hydrogen gas.

The point I am making is that the known releases of radiation is harmful to human health. Leaching of the burial grounds and surface impoindments is causing severe contamination of the shallow aquifers and groundwater, thus endangering the Tuscaloosa aquifer used by Atlanta. The aquifer is already contaminated by toxic chemicals from the plant.

Of the utmost importance is I am just relating a few of the problems or accidents. There are others too numerous to mention. My question is this.... why is Dupont being allowed to walk away scott free..... without cleaning up their own mess of contamination. No! They leave it to the Tax Payers to pay for someone else to clean up their mess..... IS THIS FAIR! The question is.... CAN IT BE CLEANED UP? I frankly don't believe it can..... from groundwater and contaminated aquifers.

I understand Westinghouse is responsible for storage of waste at the Hanford site. If this is so..... then why is the Columbia River in Washinton State, quoted as being the most radiation contaminated river in the world. Can Westinghouse do any better than Dupont. I don't think so. It is simply a matter of Big Industry coupled with Military, which you call the Military Industrial Complex. It was in 1957 Dwight Eisenhower in his farewell address.....WARNED..... Beware of the military industrial complex and the technological Elite. (ALL FOR THE GREEN BUCKS! This comment in brackets is my own thoughts).

Lets take another look at something else. Since DOE is in charge of all of the research involving radiation health effects. This is a news release dated Oct. 24, 1986 from a Congressional Committee, Chairman Edward J. Markey. I attach the news release. The title is " MARKEY release report on three decades of radiation experiments on U. S. Citizens." The experiments were sponsored by the Manhattan Project and the Atomic Energy Commission, predecessors to DOE, and were carried out from the mid 1940's to the early 1970's. In several experiments, the purpose was to cause actual injury to human beings. As Markey noted....."American citizens thus became nuclear calibration devices for experimenters run amok." Markey's ltr to Secretary Herrington (I also have the letter)describes "some of the more repugnant or bizarre" of these human radiation experiments.

My point at this part of my statement is.... No I can't trust the DOE nor the DOD..... They put every effort into nuclear production and detonation of nuclear weapons..... They do this without regard for human health or human life. I believe I have pointed this out.

I would also at this point comment to the Aiken citizens and other citizens that live in areas around the Savannah River Plant. I have cited releases of radiation from Nuclear Testing in Nevada that have fallen on you. I have recited radiation waste that has been released from Savannah River Plant. My friends, what goes up eventually comes down..... YOU ALSO ARE DOWNWIND RESIDENTS..... YOU ARE CALLED DOWNWINDERS! You are victims of radiation! Just as I am from the tests in the South Pacific where I have been documentated from being in 6 separate fallouts in 1952 alone. I am a victim of non-cancerous disabilities. The DOE has brain washed you into thinking cancer is the only disease caused by radiation. This is false! In my speech before the last scoping hearing a short time ago. I listed all the disabilities for which the Japanese Government pay their nuclear victims. I am including this list of disabilities; hopefully that the Press might publish it and then perhaps citizens of this area will wake up to the fact; they do have radiogenic disabilities, just as I do! The DOE and the DOD don't want you to know the truth! Go to your libraries..... discover the truth..... look up titles under atomic and radiation.

It was a short time ago, perhaps about 2 years ago. Senator Hollings told me he had been thinking of having an epidemiological study done of this area. To Senator Hollings, I say..... this is long past due! Do it now! Lets find the truth out and then perhaps we can stop what I consider "NUCLEAR MADNESS!"

At my last three appearances I have stated the Safety Rules and Regulations at the SRP are invalid. I still maintain this and expecially since the Radiation Effects Research Foundation Study dated Sep. 1987. By the way this study is sponsored by the DOE and the National Academy of Sciences. They ignore this study even though they sponsored it. This study shows the flaws from the Hiroshima and Nakasaki detonations.

All studies are based on this data from he Japanese survivors; ~~through studies~~. It has now been proven, these studies are invalid since they misinterpreted the Hiroshima detonation. Therefore if the RERF study proves this, then why doesn't DOE lower its occupational exposure dose for nuclear workers to 1.5 rems per year. No they continue to use 5 rems per year for nuclear workers.

The United Kingdom (England) has not wasted time..... they lowered to 1.5 rems per year for occupational exposure dose. So has the Canadian Government.

The DOE and the DOD however want another study. This is a mere putoff to restart the reactors. They now propose a new study called BEIR V which might come off or be published in 1991. BEIR means Biological Effects Ionising Radiation. These are done by the Nat. Academy of Sciences; note they are on the payroll of the DOE and the DOD in the past! They did the Mortality Studies on Veterans, which I feel are completely false.

The Safety rules and regulations of SRP Workers are based on the study BEIR III which came out in 1980. This study is invalid; expecially in view of the RERF study I just quoted which was sponsored by the DOE and Nat. Aca. of Science. I can also state that the ICRP dose standards are also wrong. I can prove this from honest Nuclear Health Physicists some of which are Morgan, Gofman, Mancuso and Stewart. I know of others including Edward Radford who was Chairman of the BEIR III 1980 study. Note he was excluded from the signing since he the Chairman knew it was wrong. I can documentate this.

My personal belief is this. IF the DOE did go to 1.5 rems per year occupational exposure dose for nuclear workers. Then the reactors would have to have so many new modifications, the tremendous cost would far outweigh..... RESTARTING THESE REACTORS!

I SAY NO TO RESTARTING THE REACTORS AT Savannah River Plant.

If anyone wishes to call me I will documentate these facts. If they come to my home I will show them my documentation.

Sincerely,

EdwarD V. Fenton

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Radon data 'misleading'

Some reports lately have described the occurrence of radon from "natural" sources in the United States ("Radiation exposure: Safe, eye on radon," SN: 11/28/87, p.347). Some of these sampling points could be misleading.

In the late '50s and early '60s I conducted research on samples from many major U.S. rivers. This included both water samples and plankton samples that received fallout from western bomb testing. Also, samples from the Tennessee, Clinch and Savannah rivers were commonly found to be highly contaminated with both isotopes of uranium and their daughter, radon, which was based on emission of alpha particles but not gamma radiation. Many reports include alpha subatomic particles as radiation, I do not include alphas as radiation, but they are ionizing materials. These ionizing materials were traced to Atomic Energy Commission and Department of Energy operations at the Oak Ridge (Tenn.) National Laboratory and the AEC and DOE Savannah River Project near Aikin, S.C.

Radon gas is a decay product of some isotopes of uranium and radium and is of concern because it emits alphas. Another industrial source of radon gas was building blocks in houses in the Tennessee Valley Authority area that were made from waste products of phosphate fertilizers, known to emit radon gas.

Louis G. Williams
Emeritus Professor of Ecology
University of Alabama
Tuscaloosa, AL 35487-1927

Louis G. Williams

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CHIEF COUNSEL AND STAFF DIRECTOR

U.S. HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON ENERGY CONSERVATION
AND POWER
OF THE
COMMITTEE ON ENERGY AND COMMERCE
WASHINGTON, DC 20515

October 24, 1986

The Honorable John S. Herrington
Secretary
Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Secretary Herrington:

As you know, the Subcommittee on Energy Conservation and Power has been conducting an investigation into radiation experimentation for human subjects. I am forwarding to you the results of that investigation, a Subcommittee staff report titled, "American Nuclear Guinea Pigs: Three Decades of Radiation Experiments on U.S. Citizens."

This report reviewed Department of Energy documents, which revealed the frequent and systematic use of human subjects as guinea pigs for radiation experiments sponsored by the Department's predecessor agencies. Some of these experiments were conducted in the 1940s and 1950s, and others were performed during the supposedly more enlightened 1960s and 1970s. The report describes in detail 31 experiments during which about 695 persons were exposed.

In many of these experiments, individuals were exposed to radiation which provided little or no medical benefit to the subjects. The purpose of several of these experiments was actually to cause injury to the participants. Many others sought simply to measure the effects of radiation on humans. American citizens thus became nuclear calibration devices for experimenters run amok.

In a number of experiments, subjects received doses that exceeded presently recognized limits for occupational radiation exposure. Doses were as much as 98 times the body burden recognized at the time the experiments were conducted.

Too many of these experiments used human subjects that were captive audiences or populations that some experimenters frighteningly perhaps might have considered "expendable:" the elderly, prisoners, hospital patients suffering from terminal diseases or who might not have retained their full faculties for informed consent.

Some of the more repugnant or bizarre of these experiments include the following:

--From 1945 to 1947, as part of the Manhattan Project, 18 patients believed to have limited life spans were injected with plutonium.

--From 1961 to 1965, at the Massachusetts Institute of Technology, 20 elderly subjects were injected or fed radium or thorium.

--During 1946 and 1947, at the University of Rochester, six patients with good kidney function were injected with uranium salts to determine the concentration which would produce renal injury.

--From 1953 to 1957, at Massachusetts General Hospital, Boston, approximately 12 terminal brain tumor patients were injected with uranium to determine the dose at which kidney damage began to occur.

--From 1963 to 1971, 67 inmates at Oregon State Prison and 64 inmates at Washington State prison received x-rays to their testes to examine the effects of radiation on human fertility and testicular function.

--From 1963 to 1965, at the Atomic Energy Commission's National Reactor Testing Station in Idaho, radioactive iodine was purposely released on seven separate occasions. In one experiment, seven human subjects drank milk from cows which had grazed on iodine-contaminated land.

--From 1961 to 1963, at the University of Chicago and Argonne National Laboratory, 102 human subjects were fed real fallout from the Nevada Test Site; simulated fallout particles containing radioactive material; or solutions of radioactive cesium and strontium.

--During the late 1950s, at Columbia University and Montefiore Hospital, the Bronx, 12 terminal cancer patients were injected with radioactive calcium and strontium.

These experiments, and others described in the Subcommittee staff report, shock the conscience and represent a black mark on the history of nuclear medical research. They raise one major horrifying question: did the intense desire to know the consequences of radioactive exposure after the dawn of the atomic age lead American scientists to mimic the kind of demented human experiments conducted by the Nazis? Did the Department or its

predecessor agencies fund or sponsor programs which crossed the line that no scientific research can ever be permitted to traverse?

While it is clear that present public and scientific officials are generally not responsible for these experiments, these circumstances nonetheless represent a historical, institutional failure. To compound the evil, in too many experiments, no long term follow up was conducted of subjects. While these experiments cannot be undone, though they must never be repeated, there are potential remedial steps that can be taken to help the victims who served as human nuclear guinea pigs.

I therefore urge the Department of Energy to make every practicable effort to identify the persons who served as experimental subjects, to examine the long term histories of subjects for an increased incidence of radiation-associated diseases, and to compensate these unfortunate victims for suspected damages. A Defense Department program provides a model for such follow up. The Nuclear Test Personnel Review, administered by the Defense Nuclear Agency, is a registry for military personnel exposed to fallout from atmospheric nuclear tests. The primary objectives of the Review are to identify the approximately 200,000 Defense Department personnel involved in such tests, to determine their exposures, to identify incidences of death or illness, and to assist veterans in claims for compensation.

If such an effort can be carried out for military personnel acting in the line of duty, surely a similar effort should be possible for the far smaller number of peaceful atomic soldiers used as unwitting human subjects in radiation experiments. If you feel that new legislation would be necessary, the Subcommittee will be pleased to work with the Department to develop it.

If you have any questions on the material in this letter or the Subcommittee staff report, please contact John Abbotts or Larry Sidman at 202-226-2424. I look forward to receiving by November 15, 1986 a description of the Department's plans for long term follow up of these experimentally irradiated subjects, and your recommendation for what new legislation, if any, might be needed for compensation.

Sincerely,

Ed Markey

Edward J. Markey
Chairman

SUBCOMMITTEE ON ENERGY CONSERVATION
AND POWER
OF THE
COMMITTEE ON ENERGY AND COMMERCE
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

EDWARD J. MARKEY
CHAIRMAN

ROOM H2-318
HOUSE OFFICE BUILDING AN
PHONE (202) 226-2
LAWRENCE A. SHOAL
CHIEF COUNSEL AND STAFF D

NEWS RELEASE

FOR IMMEDIATE RELEASE
October 24, 1986

Contact: Raoul Rosenberg
202-225-2836
or John Abbotts
202-226-2424

MARKEY RELEASES REPORT ON THREE DECADES OF RADIATION EXPERIMENTS ON U.S. CITIZENS

Washington--Congressman Edward J. Markey, Chairman of a House Subcommittee with jurisdiction over nuclear energy programs, today released a staff report titled, "American Nuclear Guinea Pigs: Three Decades of Radiation Experiments on U.S. Citizens."

The Subcommittee staff report reviewed documents which the Department of Energy supplied to Markey's Subcommittee on Energy Conservation and Power. In a letter to Secretary of Energy John Herrington, Markey noted that the DOE documents "revealed the frequent and systematic use of human subjects as guinea pigs." The experiments were sponsored by the Manhattan Project and the Atomic Energy Commission, predecessors to DOE, and were carried out from the mid-1940s to the early 1970s.

The report described in detail 31 experiments, during which about 695 persons were exposed. In many experiments, individuals were exposed to radiation that provided little or no medical benefit to the subjects. The purpose of several experiments was actually to cause injury to the subjects. Many others sought simply to measure the effects of radiation on humans. As Markey noted to Herrington, "American citizens thus became nuclear calibration devices for experimenters run amok."

Markey also noted that "Too many of these experiments used human subjects that were captive audiences or populations that some experimenters frighteningly perhaps might have considered 'expendable:' the elderly, prisoners, hospital patients suffering from terminal diseases who might not have retained their full faculties for informed consent."

Markey closed his letter by urging the Department of Energy to make "every practicable effort" to identify the persons who served as subjects, to examine their long-term health histories, and to compensate victims of radiation-associated diseases.

Markey's letter to Herrington describes "some of the more repugnant or bizarre" of these human radiation experiments.

Edward "Victor" Fenton
Regional Vice President
Executive Board Member

NATIONAL ASSOCIATION OF
RADIATION SURVIVORS

656 Boulevard, N/E
Orangeburg,
South Carolina 29115

Phone 1-803-534-7707

August 24, 1988

Director
Veterans Administration Radiology Service
Veterans Administration Center
Department of Medicine and Surgery
Washington, D. C. 20420

Encl: (1) All enclosures will be listed in a sheet at the end of this letter!

Ref : (1) All references will be listed in a sheet at the end of this letter!

Dear Director:

I have been in correspondence with Deputy Director Layne A. Lrash with the Agent Orange Projects Office at the Veterans Administration. Please see encl: (1) which is his letter to me.

In this letter (Enclosure 1) Deputy Director Lrash informs me that your office is who is currently in charge and who has primary responsibility for the coordination of radiation exposure problems emanating from the testing of Atomic Weapons at Hiroshima and Nagasaki, Japan.

In this letter I will use my own records at times to project problems which do effect all Atomic Veterans. My letter is not primarily to benefit myself but it is to understand and try to interpret the various policies and procedures which must emanate from the Veterans Administration Radiology Service, in regards to all Atomic Veterans who were exposed to nuclear and thermonuclear environmental tests, both in Nevada at the test site and also at the Proving Grounds at Eniwetok and Bikini Atolls in the South Pacific at the Marshall Islands.

The other purpose is to bring to your attention many facts and other information pertaining to nuclear radiation and perhaps clear up certain discrepancies and errors where I feel the Veterans Administration is clearly in the wrong.

Since finding out from Deputy Director Lrash that you are in charge of the policies and procedures regarding problems involving the Atomic Veterans and their exposures to radiation I can only say..... I am very angry at the lack of information that your radiology service is giving out to aid the Atomic Veterans. Where have you been?

South Central Region
Alabama Mississippi
Florida North Carolina
Georgia South Carolina
Louisiana Tennessee

After my discharge from the Naval Service, I was told that any problems that a veteran had regarding problems emanating from military service were the responsibility of the Veterans Administration.

It is my personal opinion..... when it comes to radiation, then the Veterans Administration has fallen down on their responsibility completely in everyway. I was also under the impression that the V. A. was created to help the Veteran, his wigow and in turn his child in case that veteran died. This is not so with the V. A. when it comes to Atomic Veterans.

What is clear to me though..... is that the Veterans Administration has developed a policy in regards to radiation exposure in the service that is both deceitful and negligent to the Atomic Veteran.

This is clear to me from the discovery part of litigation that took place in San Francisco, California in the trial in Federal Court between the National Association of Radiation Survivors versus Turnage (Veterans Administration).

In the process of Discovery..... the Veterans Administration was found guilty of misconduct, destroying veterans records, misrepresentation and lying under oath by V. A. Officials. This is my understanding! Federal Judge Marilyn Patel fined theV. A. in the discovery part of litigation over $13½,000.00. This was a landmark decision!

We are awaiting the final verdict on this trial!

Due to the National Association of Radiation Survivors, our attorneys has now stopped illegal practices that were routinely used by the Veterans Administration in the Atomic Veterans Claims. Each one has not been eliminated! I now will list these for you:

(1) The V. A. routinely DISCOURAGED HEARINGS by veterans until after the initial denial. Now the right to a hearing at any time is clearly stated in the pattern letters the VA sends.

(2) The V. A. used the "record purpose disallowance" to dismiss claims, just because routine paperwork often irrelevant, was not completed by the veteran within arbitrary time periods. This has been stopped!

(3) At the Board of Veteran Appeals (BVA)--the VA Supreme Court--three practices which violate due process have been stopped!

(a) The production quota system which generated bonuses--but demanded 40 decisions a week, has been ordered to cease-- as have the bonuses.

(b) The use of the "courtesy sign-off", in which only one member of the BVA actually read the claim folder, & the other two added their names to his decision, has been stopped.

(c) The Secret list of 12 Congressman whose constituents rated "SPECIAL TREATMENT" from the BVA has been terminated.

(d) The practice of "top-sheeting" in which only the front of a VA Claim was even read, has been stopped.

So you see Mr. Director after discovering these things..... can you doubt me when I say the Veterans Administration has plain been deceitful and has not fulfilled their obligation to the Atomic Veteran.

Getting into another area, that makes me feel additional anger, I would like to state that to get anything done whatsoever within the Veterans Administration..... the veterans and others (nuclear workers, test site workers and etc.) have had to form their own organizations and seek professional help in the way of scientists and attorney's to overcome the obstacles that the Veterans Administration has placed to obstruct justice and compensation for the Atomic Veteran!

In my radiation claim I found that not only was I now fighting the Veterans Administration but now I was also fighting the Department of Defense through their Agency the Defense Nuclear Agency. It appears to me that the Veterans Administration has worked with the Defense Nuclear Agency in denying our claims.

First background on the DNA. The Department of Defense established the DNA to do two things: 1. To promote nuclear weapons for defense of our country. 2. To evaluate the atomic veterans. It is clear now that these two policies collide! Since our country is in a policy that involves nuclear power and the Dept. of Defense utilizes nuclear power (atomic weapons), then it would be detrimental to this Defense Policy to tell anything that would deter them from seeking this policy. If the truth of the Atomic Veteran and his exposures would come to light.... then it would be detrimental to Defense Policy.

Therefore it is like asking the Fox to guard the Chicken Coop.....when you think of the Defense Nuclear Agency being unbiased and telling the truth about what happened on these nuclear and thermonuclear tests. Until someone other than the Defense Department and the DNA with their sub-agency Nuclear Test Personnel Review, is allowed to investigate and have access to all records that the Dept. of Defense has regarding the nuclear tests and the Atomic Veterans..... then justice will not be served..... since they will put the Defense of this country ahead of the Atomic Veterans. Herein lies the conflict and the injustice to the Atomic Veterans.

So in essence you have the same Agency (Department of Defense) evaluating us when they were the ones that irradiated us to begin with. We will never obtain justice if this continues and is allowed. That is if we are to get to the truth!

The ball does not stop bouncing here. Lets take another Agency called the Department of Energy. In reality the DOE is in reality the old Atomic Energy Commission. The AEC was the one that also exposed us. It took two..... the DOD and AEC. The AEC became various agencies but primarily the DOE does its manufacturing of plutominium and other radioactive elements. From here the DOE is in charge of all phases of manufacturing of atomic and thermonuclear weapons until they become Hydrogen Bombs.

But it does not stop here. The Department of Energy receives all the money and is in charge of all the research that is being done to determine the deletorious effects of radiation. They control the laboratories and even the grants of money that are given for outside research in the health effects of radiation.

Do you think they are going to tell the truth about the deletorious effects of radiation when in reality they would be cutting their own throats regarding production of nuclear and thermonuclear weapons. This is sort of like asking Dracula to guard the Blood Bank. They can't be unbiased since again it would be detrimental to their policy of producing nuclear weapons. Plus if the truth were told then probably the occupational exposure dose would have to be reduced to 1.5 rems per year and thus cost more money for production since it is just too dangerous.

Thus you have one thing occuring and that is that the Medical Community does not have anything in their medical textbooks regarding the health effects since the DOE will not release the information and studies (truth) that is known at this time.

So Mr. Director, if we the Atomic Veterans seek the truth, then we must go to those Nuclear Health Physicists who will tell the truth and who will not be intimidated by the DOD and the DOE. They are many such scientists who are seeking the truth and who are not just going along with government policy to get a big, fat, government check!!!!!!!!

Many of these scientists who I will go into later in this letter cannot be intimidated and thus in seeking the truth they have even had their government grants cut off and their characters assassinated. More about this later.

Then their are those who will sell their souls to the government for that fat check..... since they have mortgages on 150,000 dollar homes, their wives love fur coats and in turn they have several children in Ivy League Schools and they have to pay for their education. I feel they are in government laboratories, within the National Academy of Sciences and even within the Veterans Administration. They are even in our schools of higher learning, where they receive grants and thus add to their already fat checks they receive from Universities.

Lets for a minute take a veteran who files a claim for Radiation Disabilities due to exposures in nuclear tests. He files his claim and then the V. A. will process it. In turn the first thing they will do is go directly to the NTPR program under the DNA who is under the Department of Defense. The V. A. asks that they substantiate his claim and prove he was on his tests. This is done and then the DNA does another thing.

This is to establish his radiation dose. Since the government (DOL & AEC) failed the Atomic Veterans initially and the film badges only recorded gamma radiation and even this is questionable. They now use the excuse..... we can't tell so we will reconstruct the test the veteran was own. We will in turn through the records we control come up with a calculated dose of radiation. Calculated if you will look it up in the dictionary actually means GUESS! They weren't there and yet they want to take the records that they control and come up with a Calculated Dose of radiation.

Now can you guess who does this calculated dose of radiation. It is an outfit or defense contractor called SAI. These are the initials! The SAI not only is doing our Calculated Doses of radiation but they are also manufacturers of tomahawk missles and are into star wars research into millions of dollars. To get a calculated dose from them is again like asking the Fox to Guard the Chicken Coop. Since they are a defense contractor under the Department of Defense then they know if they don't do what they are told to do..... they will not get the millions and billions they get for manufacturing government weapons and systems.

As a resort..... The Calculated doses of radiation are ridiculous. I believe if you check the records..... 99.9 percent of veterans who filed claims were given doses (calculated) of less than (one half a rem $\frac{1}{2}$). I believe I was given a dose calculated of 0.42 rem. Initially they only gave me an external dose. I found this was for gamma. I was one of the first that asked about the other radiation. Accordingly they gave me an internal dose but this added up to the 0.42 rem calculated. DNA idea is with a low dose..... no ill health effects! Absurd!

Now what is the amazing thing is this. I forwarded to Commander Bell of the Navy NTPR a pamphlet called "Irradiation of Personnel at Operation Crossroads". This pamphlet is the Stafford Warren papers. Colonel Stafford Warren was the Officer in Charge of Radiation Safety at Operation Crossroads in 1946. He had many other men (scientists) under him. These men were in charge of measuring the radiation.

This pamphlet called "Irradiation of Personnel at Operation Crossroads" was left in a library in California and were discovered in the early 1980's. They were gone over thoroughly and one of the scientists under Colonel Warren read them and in turn the pamphlet was published. I have made it a part of my radiation claim C 15 279 499 which is now at the Board of Veteran Appeals. By copy of this letter..... I give you permission to examine my record and in turn look at this pamphlet. I might add that after Sonny Montgomery of the House Veterans Affairs Committee had it examined he stated it has "A Wealth of Radiation Fact in it." I invite you to examine all facts.

Additionally I appeared before the hearing before the Subcommittee on Compensation, Pension and Insurance of the Committee on Veterans Affairs, House of Representatives, 100th Congress, First Session, May 20, 1987, Serial No. 100-16. I again introduced this into evicence plus other pertinent information pertaining to Veterans. I personally feel it was placed in file 13 (trash can) and in turn placed on a back burner. I invite you to also write and get this information.

To set the record straight..... Dr. Karl Z. Morgan, who is known as the father of health effects of nuclear radiation, and who I consider a personal friend also introduced this into the 86th Congress in Congressional Hearing. It was ignored then also. It appears no one wants to get to the truth of the matter! However Dr. Karl Z. Morgan was the scientist under Colonel Stafford Warren and Dr. Morgan was the scientist that was concerned about the radiation doses. He knew they were high and in turn men (atomic veterans) were being irradiated. Dr. Morgan did introduce this pamphlet into Congressional Hearing as early as 1983.

Now on February 18, 1988, I again appeared before the Veterans Advisory Committee on Environmental Hazards at the V. A. Center. I now introduce Endosure 2 which is my letter to the Advisory Committee on Environmental Hazards. This letter was my speech and in turn I quickly ran through 28 enclosures which was the enclosures to this letter. Two of them are not listed but I wrote them in while at the meeting and also submitted them. One of these was a book called "Killing our Own". I believe if you would read this book you would get an education in the deceit this government has practiced on its veterans, nuclear workers and the civilians of America. Again Enclosure 21 of this letter is "Irradiation of Personnel at Operation Crossroads". I also invite you to request from Executive Secretary Fredrick Conway of the Advisory Committee on Environmental Hazards at the V. A., all of the 28 enclosures and I believe you will find them interesting information; pertaining to health effects of radiation. I request that you investigate all this scientific information.

You see Mr. Director, the Defense Nuclear Agency did one big IN DEPTH STUDY ON RADIATION AT OPERATION CROSSROADS. This one study is used to evaluate all the veterans. Even though I was on Operation Ivy and Castle..... Operation Crossroads is the in depth study that they use to evaluate all the tests and they were many.

Since the DNA uses this indepth study then I feel I have the right to question their study since the pamphlet "Irradiation of Personnel at Operation Crossroads" completely refutes what the DNA stated in their study. In fact the General Accounting Office checked on their studies and found them lacking. Since they were found lacking, the DNA has done nothing whatsoever to change their information. WHY!

In this pamphlet that Dr. Morgan himself introduced into the 86th Congress is the fact that Dr. Morgan was at Operation Crossroads and he asked/permission from Colonel Stafford Warren to go out and check the Beta radiation that the Film Badges would not record.

Dr. Karl Z. Morgan did go out and record this radiation. He found that on an average that the Beta Radiation was on an average of 10 Beta to 1 Gamma. However he found that in certain spots where radiation fallout had occured, that the radiation (beta) was accummulative or additive and that in one gun mount, he found that there was 600 Beta to 1 Gamma. How did this occur..... it simply added up in that it was accummulative in that it was absorbed into the paints and reisens on the ships, rust, ropes and lines and in my case the wooden flight deck of the carrier Rendove CVE-114 it was absorbed and was additive. I might add that in my Radiation Claim I can document the Rendova in being in 6 separate fallouts of radiation and this is documentated in a letter that Commander Bell sent me and this letter is signed by the Captain of the Rendova CVE-114 Ship.

Commander Bell in correspondence to me and I have this stated that the Beta radiation versus gamma was on a ratio of 1 beta to 1 gamma.

Now I ask you who would judge this? Who do you believe..... the DNA and the defense contractor who is after the Defense Dollar, who is making an educated guess or calculated dose on the information that the DNA handpicks to substantiate their lies OR do you believe the scientists who were on the spot and made the accurate scientific radiation doses measurements while at the test site in 1946? Please advise me!

I will say this that I have already called Commander R. T. Bell with the Defense Nuclear Agency a LIAR and also Deputy Director Marvin C. Atkins of the Defense Nuclear Agency also a liar.

I proved they were lying in my letter that is in my radiation claim C-18-279-499 and which was also forwarded to Commander Bell. This letter was addressed to Mr. Robert Alvarez and it is dated Aug. 28, 1986. As early as 1986 I prove to you that "Irradiation of Personnel at Operation Crossroads" was in the hands of Commander R. T. Bell. It is so stated in the letter to Robert Alvarez. In fact in this letter you will see consistently how Commander Bell lied to me and I refuted him on all issues.

Yet in the NARS versus Turnage Trial in San Francisco, Commander Bell when he was confronted with Stafford Warren papers stated..... this is NEW EVIDENCE and we would have to take it into consideration. I say this.....Commander R. T. Bell of the Defense Nuclear Agency..... committed perjury in the NARS Trial. He already had the Stafford Warren papers in that they are in Irradiation of Personnel at Operation Crossroads. He is a master of deceit! In the NARS trial he also stated he was a Nuclear Physicist ..... due to his on the job training in the U.S. Navy. I always asked for his credentials and in my letters he stated he was a Navy Technician. Again he is distorting the picture. He is no more a nuclear physicist than I am a monkey. You Mr. Director are in Radiology..... write him and ask him technical information about radiation. He can't answer!

I now enclose a letter that I received from Dr. Karl Z. Morgan and it is regarding his opinion in my case regarding my exposure. He gives his credentials and his right to give his estimate. I remind you under Public Law 98-542 I am to be given the Benefit of Doubt. DNA says I got 0.42 rems of radiation. Dr. Morgan based on information I forwarded to him and also my Navy Medical Records stated I got between 10 to 100 rems of gamma and between 100 to 300 rems of Beta Radiation. This was based on health records at Operation Ivy in 1952 and is based on the health effects I had within 3/to 2 days weeks after being exposed. Does the V. A. give me the benefit of doubt from a qualified Nuclear Physicist like Dr. Morgan. No! They take the word of the DOD and the DOE (old AEC) who exposed us to begin with and who are covering up! They (VA) further take all information provided by Commander Bell when in reality he is an accomplished liar and guilty of deceit!

In other words, the Veterans Administration takes any report or study that the Defense Nuclear Agency (Navy Nuclear Test Personnel Review) at face value as if it was the holy gospel. Even though we enter valid information from world renouned scientists such as Dr. Karl Z. Morgan, Dr. John W. Gofman, Dr. Edward Radford, Dr. Alice Stewart, Dr. Rosalie Bertelle, and numerous others. Are we given the Benefit of Doubt that is part of Public Law 98-542 which is the Agent Orange and Radiation Law that was signed I believe in 1984! No they take at face value the studies that the DNA has rigged with the help of a Defense Contractor SAI who is in weapons production and weapons systems (star wars) making millions and billions of dollars. The GAO found these studies lacking! Why?

Is it any wonder that an Atomic Veteran can't win his radiation claims. If it gets down to the nitty gritty of the thing and we appear to be winning..... then the Defense Dept. and the Department of Energy..... runs behind a shield called National Security and they said it would be detrimental to the country to release information that they control. Thus theAtomic Veteran is left with no other option than to fight the might of the United States in all its glory and majesty! If we get any information it has to be through the Freedom of Information Act or in Federal Courts such as the NARS versus Turnage (VA) Trial. Why?

At this time I would like to enter Enclosure 4 which is letter addressed to Mr. Fredrick Conway, Executive Secretary of the Veterans Administration, Advisory Committee on Environmental Hazards. This letter was written at my request since I knew Dr. Morgan. Please notice that Dr. Morgan places me as a copy to on his letter. Please read this letter and see for yourself his additional qualifications and the radiation facts that this letter contains. I feel that he certainly is qualified to judge the health effects of radiation due to his long experience in studying the deletorious health effects of radiation. Please also notice the various studies such as BEIR III 1980 and the U.N. studies called UNSCEAR Studies. I feel that this letter speaks for itself. Please note he mentions that he presumes that the VA still sticks with the BEIR III study or report. Dr. Morgan then states that for accuracy BEIR III 1980 must now be classed as antediluvian (antiquated or obsolete). I mention this remark about BEIR III being obsolete or antediluvian for another reason. It follows:

In letters that I have received from Commander Bell with the Navy NTPR and LNA he has always stated that BEIR III 1980 (Biological Effects of Ionizing Radiation) he has numerous times told me that the Atomic Veterans or studies involving veterans that the LNA has done are based on two studies. These two studies are BEIR III 1980 and UNSCEAR 1977 and 1982. "These studies are invalid and flawed!"

Herein is another contradiction of the DNA's studies. Dr. Morgan in essence is telling you that the DNA's studies are invalid that they have done in regards to the Atomic Veterans. I have known this for years and you will find it to be true since I have it documentated it in numerous ways in my radiation claim C 18 279 499. Please study my claim and you will find this to be so.

You will find that at my hearing on a Regional Level in Columbia, S. C., I requested that all of the DNA's studies be thrown out of my record.....SINCE THEY ARE FLAWED, OBSOLETE AND ANTIQUATED! I based this on my study of the book (medical textbook) called Radiation and Human Health by Dr. John W. Gofman. I read this book 3 times believe it or not. I handpicked the information by page number and put this into the Robert Alvarez letter dated August 28, 1986. It is all there in the same letter I referred to earlier in this letter.

Therefore by copy of this letter and since I want a complete copy of this letter sent to Director Kenneth Eaton of the Board of Veteran Appeals..... then I again request that all the studies by the LNA used to evaluate Atomic Veterans be thrown out of my Radiation Claim. I ask the benefit of doubt rule apply and this new information be used as the basis of this request. More to come!

I also want it noted by Mr. Kenneth Eaton that at my hearing on a Board of Appeals Level, I again requested that all the DNA studies be thrown out of my claim since they are invalid. I do not think I am out of order in requesting this from Director Eaton. I am further going to make Senator Strom Thurmond aware of this and also my Congressman Floyd D. Spence. In all probability Chairman Alan Cranston & Congressman Sonny Montgomery both of whom are Chairman of their Veterans Affairs in the House and Senate respectively.

I also wish to enter with this letter for your attention a letter Encl 5 that Dr. Karl Z. Morgan wrote to Dr. John W. Gofman. I would quote a sentence from this letter:

> "Now I am amazed to see how our adversaries are inventing new ways to eat crow. Irrefutable scientific evidence now exposes them as liars and murderers and yet they hold their heads high... pretending to be honorable and circumspect scientists, who have been right all the time."
>
> "I feel like the father of a child convicted of multiple murders. I thought when I was the first President of the Health Physics Society that I had conceived a scientific and professional organization, but now it has become a den of THIEVES, a labor union of the nuclear industry and the government political establishment. It is a union to protect the nuclear industry, to cover up mistakes, to depreciate the risks of radiation exposure, to prevent our atomic veterans from receiving compensation from radiation injury and to defend our government in court for the mistakes it has made."
>
> end of Quote!

I now wish to enter an article (Enclosure 6) titled "Atomic Bomb Loses Reassessed" This appeared in Research News on 18 December 1987 page 1649 to 1651. This particular article refers mainly to the new RERF Study of September 1987. When you request the Advisory Committee to forward the letter which was my speech on Feb 18, 1988 you will find that the RERF Study is there ..... complete! This would be Enclosure 2 of this letter but Enclosure 12 to this letter I refer to which was the letter I presented to the Advisory Committee on Feb. 18, 1988

In this new article it breaks down the RERF study where a layman can understand it. It explains how the Hiroshima data was found to be false and that the new data proves radiation is twice to three times more dangerous. Therefore due to this Radiationn Effects Research Foundation (RERF), the United Kingdom is no longer depending on the ICRP (International Commission on Radiological Protection) which used to be the Bible as far as radiation dose standards are concerned..... The United Kingdom (England) is now reducing their occupational exposure dose to 1.5 rems per year. However the DOD and DOE probably through pressure on the ICRP are holding the occupational exposure dose to 5 rems per year for nuclear workers, in the United States, creating more murders of innocent workers and civilians.

So here we go again! 43 years after Hiroshima and Nakasaki were bombed, the scientists discover they made mistakes. All previous studies on radiation previous to September 1987 are now quite invalid. However in the U.S. due to political pressure and economic pressure are holding out..... they demand more studies which will come out in approximately 2 years.

How many more studies do the Atomic Veterans have to go through before even this RERF study might be proven wrong. This is unbelieveable that veterans must wait 43 years and then told to wait again. When is this country going to wake up and award presumption for any veteran that had even the smallest dose of radiation.

Another enclosure 8, is submitted to you. This is a letter written to Mr. Lando W. Zech, Jr. Chairman of the U. S. Nuclear Regulatory Commission dated May 4, 1988 from Dr. Karl Z. Morgan. In this letter he is very critical about the NRC. The NRC is another of this federal agencies that was broken down from the AEC. In this letter Dr. Morgan is again showing where the Occupational Exposure Dose and Civilian Doses should be immediately lowered. This letter frankly states how the Nuclear Regulatory Commission is going along with the nuclear establishment and thus is completely wrong in their present views of holding at a 5 rem per year occupational exposure dose. I feel when you read this letter you will understand. It just stands to reason that the NRC is merely doing what is required of them in support of the present policy of nuclear power. What in reality is happening is that the Atomic Veteran is being sacrificed..... his widow and child are living in poverty. Who cares as long as the bureaucrats get their self esteem and prestige..... while the Defense Contractors get bigger and fatter pay checks. As for the nuclear worker he is just a number just as the Atomic Veteran is nothing more than a number and a Dis--cretionary Function.

Last year in another trial in San Francisco, Calif, other than the NARS vs Turnage Trial..... a Justice Department Lawyer stood up in court and said:

> "The United States knew the illeffects of radiation. It knew it would cause cancer and genetic effects..... however it was felt that the exposure of veterans was a discretionary function..... in that for the good of the country..... it felt that these men had to be sacrificed!

These are not the exact words but in effect this is what was said. By the way the court reporter lost this tape by erasing it. Pat Broudy, California Vice-President of NARS, wrote a letter to Chairman Alan Cranston about destroying this tape. I received a copy of this letter. So far as I know Chairman Cranston has not replied to Pat Broudy about getting statements from the Judge and others to certify that these were the words of the Justice Department Lawyer. I feel that Chairman Cranston of the Senate Veteran Affairs Committee should make an effort to get certified statements about what the Justice Department Lawyer did say! I would appreciate it if he would do this for the Veterans.

Another letter (enclosure 8 is submitted. I feel that it is important. It is from the Chairman for the Committee for Nuclear Responsibility. The Chairman is Dr. John W. Gofman. An enclosure to this letter is called Revivel Movement in Radiation Land.

This letter shows how government scientists and others are fooling themselves as well as the public. In essence this document proves that radiation committees have been wrong. I feel that when you read this document you should tend to agree. I would like your comments on this enclosure to this letter. Pro or Con.

In our latest newspaper Volume VI Number 3 on page 7 you will find a list of radiogenic diseases..... Titled PL 98-542 versus PL 100-321. I can assure you that the 13 cancers given to us is a half of loaf of bread. NARS will continue to fight to get the other 8 cancers left out of PL-321 which are contained in PL-542..... into the list of presumptive diseases. I forward this paper plus other issues for your information. Please notice that under the 8 cancers are cataracts. In Nov. 1986 the Advisory Committee on Environmental Hazards passed cataracts, non cancerous thyroid and breast cancer as radiogenic. How long after it passes does it take to make it law within PL 98-542. " 2 Years is a mighty long time to wait for the Veterans Administration to put something into their rules and regulations" Don't you agree! I would appreciate your checking with Mr. Vogel with the Benefits and Compensation Office and getting a reply whey we can expect these three diseases as radiogenic.

Perhaps this letter has been lengthy. It will be lengthy when you request all the information that I submitted to the Advisory Committee last Feb. 18, 1988. However since I have found you have primary responsibility for the coordination of radiation exposure problems..... then I feel I should be notified what your policy is and what your priorities are for the future. I need to know these things so I can aid other atomic veterans.

In the back of our Newsletter or Newspaper Vol VI Number 3 you will find that our convention will be held in Washington on Sept. 16 to the 18. If you notice on the 17 Sep. 1988 we will have a medical panel with Dr. Karl Z. Morgan present. It is also my understanding this workshop will entail going into RERF Studies. I invite you to this workshop. If you can't make it perhaps you have someone in your department who would like to attend. Just ask for me at the Convention.

Please excuse my errors in this letter. I have cataracts on both eyes and it is most difficult to type. I have gotten some help in the typing of this letter. Cataracts are hell if you wish to know! Hoping to hear from you soon in regards to the contents in this letter.

Sincerely,

Edward V. Fenton

Copy to:
NARS
Director Kenneth Eaton BVA
Senator Strom Thurmond
Congressman Floyd Spence
Chairman Veteran Affairs (House)
Chairman Veteran Affairs (Senate)
File
Associated Press

Enclosures: (1) Letter from Layne A. Drash, Department of Medicine and Surgery
(2) Letter to Advisory Committee dtd Feb. 18, 1988.
(3) Letter from Dr. Karl Z. Morgan to Edward V. Fenton
(4) Letter to Advisory Committee (Conway) dtd Feb. 10, 88 from Fenton
(5) Letter from Dr. Karl Morgan to Dr. John Gofman dtd May 30, 1988
(6) Artile titled Atomic Bomb Doses Reassessed
(7) Letter to Nuclear Regulatory Comm from Dr. Karl Z. Morgan 1988
(8) Revival in Radiation Land by Dr. John W. Gofman
(9) Article on New Legislation long overdue PL 100-321

NewsPapers from NARS.

It is hoped that some of this information will aid the V. A. in seeking the truth!

It is further requested that a copy of this letter be sent to Administrator Thomas Turnage; another complete copy to Director Kenneth Eaton of the Board of Veteran Appeals for inclusion into my Radiation Claim C-18-279-499; and the last copy be sent to Fredirick Conway, Executive Secretary to the V. A. Advisory Committee on Environmental Hazards so that any information can be given to all members of the Advisory Committee! I appreciate this since I live on less than $500.00 per month in what you could call a poverty state. Thanking you kindly! This $500.00 per month comes from Social Security Dirability! However the V. A. tells me to go to work..... I am neither Service Connected nor Non-Service Connected..... frankly I believe the V. A. in many cases are out of their minds!

1984 Castleway Drive
Atlanta, GA 30345

February 10, 1988

Dr. Fredrick Conway, Secretary
Veterans Administration Committee
on Environmental Hazards
Veterans Administration Central Office
810 Vermont Avenue, NW
Washington, DC 20420

Dear Dr. Conway:

I would like to take a few minutes of your time to discuss a problem which I believe should be given serious attention by your committee, i.e. improper recognition and consideration of the risks to our veterans and members of the public from exposure to low levels of ionizing radiation. Before I do so, however, I am adding a paragraph about my background and justification in bringing to you my concern about this problem.

I have been working with ionizing radiation for 56 years--the first 10 years as a cosmic ray physicist and the last years as a health physicist. I was one of the first five health physicists; the others were Drs. E. O. Wollan, H. M. Parker, C. C. Gamertsfelder and J. C. Hart. We gave birth to this new profession at the University of Chicago during and shortly after man first transmuted elements in a nuclear reactor located in the West Stands of the athletic field on December 2, 1942.

I was director of the Health Physics Division at Oak Ridge National Laboratory for 29 years during which time I was often referred to as the Father of Health Physics. I was the first president of both the Health Physics Society and of the International Radiation Protection Association. This latter organization now comprises about 20,000 member health physicists. I was a member of the National Council on Radiation Protection (NCRP) and of the International Commission on Radiological Protection (ICRP) for about 20 years and now am one of only two persons who are emeritus members of both organizations. During my entire active membership in NCRP and ICRP I was chairman of the Internal Dose Committees of both organizations. These committees set the levels of maximum permissible concentration (MPC) in air, water and food for over 200 radionuclides and these values are the bases of MPC values used today in the US and in the rest of the world. I have been a member of the faculty of four universities (Vanderbilt, Univ. of Tennessee, Georgia Institute of Technology and Appalachian State Univ.) where I organized health physics programs, conducted research and taught courses in health physics. I have published almost 400 scientific articles dealing with ionizing radiation, health physics instrumentation, measurements, protection measures, radiation carcinogenesis, reactor accidents, internal dose, etc. My life goal is to make the risks from the use of nuclear energy and all forms of ionizing radiation As Low As Reasonably Achievable (ALARA) and to try to assure that the overall benefits of this great source of energy exceed its acute and long term harmful effects. I am not against nuclear energy per se but I believe it is long past the time we should take a serious and completely objective (unbiased) look at the problems associated with the industrial and military applications and methods of

production of this new source of energy and take measures to reduce the concomitant hazards associated with it. For the past 15 years I and some of my associates have been calling attention to new data on the high risk of low level exposure, e.g. as shown in studies of radiation workers (Mancuso, Stewart and Kneal), studies of early radiologists (MacMahon), studies of fetal exposure (Stewart), studies of children with ringworm whose heads were dosed with X-rays (Modan), etc. Unfortunately, however, the NCRP, ICRP, UNSCEAR, DOE, DOD, NRC, VA and the nuclear industry clung to conclusions from old studies on the survivors of weapons detonations over Hiroshima and Nagasaki as interpreted in reports of ICRP, UNSCEAR and BEIR-III. They refused to accept the results of studies such as I mention above or to recognize the serious flaws in these Japanese data. I pointed out in scores of publications the errors in this evaluation and interpretation of the Japanese survivor data but all to no avail because the establishment was very adamant in its position and refused to consider lowering the recommended maximum permissible levels of exposure to ionizing radiation.

A few years ago a team at Lawrence Livermore National Laboratory found that there was irrefutable evidence that the use of the data on the Japanese atom bomb survivors seriously overestimated the dose and underestimated the radiation risks. This LLNL group was rather coy in their early conclusions because after all they were part of the establishment and it is not healthy to bite the hand that feeds you. A host of nuclear zealots tried to downplay these findings--that was the popular thing to do. I chided those trying to undermine scientific findings (Science, vol 213, p 604) and the caldron boiled furiously for a few years but in 1987 the lid blew off the pot when scientists working on RERF (the Japanese survivor study program) confirmed the cancer risk had been seriously underestimated. The ICRP at its 1987 Como Meeting acknowledged these findings but indicated it would wait until more studies were complete before reducing radiation exposure--wait to count more bodies. (NCRP said "me too.") The NCRP is continuing to drag its feet. In the UK they are not waiting and are already lowering the permissible exposure levels. Presumably the VA still sticks with the BEIR-III report which for accuracy must now be classed as antediluvian.

I will never cease to be shocked as I reflect on some of our mistakes in this area. I mention here only three examples: 1 - the high levels of radiation exposure during the war years to the population downwind from Hanford Washington from I-131 releases, 2 - the high levels of population exposure resulting from Savannah River Operations and 3 - the high levels of exposure to our veterans in the South Pacific and at the Nevada Test Site. I could write a book about the shortcomings of each of these three operations but will not burden you with more of this here.

In the past 15 years I have testified in many court proceedings on behalf of persons with radiation injury and many of these hearings were associated with the three above sources. I bow my head in shame when I recall that in these cases departments of our Government including the VA have repeatedly denied any responsibility or damage caused to persons exposed in these operations. I am proud of the sacrifices made by many of our veterans but feel great remorse at the kind of treatment they have received from the VA. Will history have to record that we in the US are calloused in our disregard for the suffering of our veterans

and their families who are dying from radiation damage? Should those of us who try to help these suffering veterans support the VA with our taxes when a large fraction of the veterans are crying in pain and in vain that the VA seems to be operated principally to assure they receive neither sympathy nor compensation for injury--just the runaround? I beg you to listen to them and give them the assistance they sorely need. The money spent by the US to deny help to these suffering veterans and others would go a long way toward providing the help they so desperately need.

Sincerely,

Karl Z. Morgan

Karl Z. Morgan

KZM:lag

cc: Mr. E. Victor Fenton
Regional Vice President of Board
National Assn. of Radiation Survivors

July 21, 1989

Secretary Edward J. Derwinski
Secretary of Veterans Affairs
Veterans Administration Center
Washington, D. C. 20420

Ref: (a) Edward V. Fenton's Radiation Claim C-18-279-499 which is at present at the Columbia, South Carolina Veterans Administration Regional Office.

(b) Legislative Hearing on Radiation Measures -H. R.-1811, S-1002 and S 453. Within this U. S. Govt Printing Office publication Serial N. 100-16 dated May 20, 1987 is the testimony of Edward V. Fenton who was invited to give testimony before the Committee on Veterans Affairs, House of Representatives, the Subcommittee on Compensation, Pension and Insurance, One Hundredth Congress, First Session.

Encl: (1) Letter addressed to Edward V. Fenton, National Association of Radiation Survivors, 656 Boulevard N/E, Orangeburg, S. C. 29115 from The Friends of Hibakusha, 1759 Sutter Street, San Francisco, California 94115. This letter contains a list of the Radiogenic Disabilities that the Japanese Government awards and compensates the Hibakusha; Hibakusha are the Japanese Victims of the Hiroshima and Nakasaki Atomic Bombs dropped on those cities in 1945.

(2) Letter addressed to the Director, Veterans Administration Radiology Service, V. A. Center, Department of Medicine and Surgery, Washington, D. C. 20420 from Edward V. Fenton, V. P. of NARS dated August 24, 1988. This letter remains unanswered and numerous phone calls to the V. A. also have not resulted in answers to allegations and documentated evidence.

(3) Article titled "Expert cites Underestimated Radiation Harm at Early Bomb Tests by Pamela MacLean in The Stars and Stripe Newspaper. This appeared shortly after testimony in the NARS vs Turnage Trial in San Francisco in Federal Court.

(4) Statement of Edward V. Fenton, Regional Vice Present of NARS, Orangeburg, S. C. 29115, which was presented and spoken before the Scoping Hearings of the Department of Energy on April 20, 1989.

(5) Portion of Research News, page 1849, dtd 18 December 1987 titled Atomic Bomb Doses Reassessed. In this article it expects for Britain to immediately lower their Occupational Exposure Dose to 1.5 rems per year.

(6) Report prepared for the use of The Committee on Interstate and Foreign Commerce, United States House of Representatives and its Subcommittee on Oversight and Investigations dated August 1980. The title of this report is "The Forgotten Guinea Pigs". A report on Health Effects of Low Level Radiation sustained as a result of the Nuclear Weapons Testing Program conducted by The United States Government. This is a U. S. Govt. Printing Office publication , 96th Congress, 2nd Session, Committee Print 96-IFC 53.

Encl: (7) Letter to Mr. Fredrick Conway, Secretary of the Veterans Administration Advisory Committee on Environmental Hazards from Dr. Karl Z. Morgan dtd February 10, 1988.

Dear Secretary Derwinski:

This letter extends to you my congratulations on your appointment as Secretary of the Veterans Affairs Committee. If I can at anytime provide you information that would help you seek the truth involving the Atomic Veterans, then you only have to write and I will be happy to do so.

Additionally this letter serves two purposes: (1) to give you documentated information and documents and (2) through my own Radiation Claim which is Reference (a), facts about my own claim plus the plight of other Atomic Veterans who have been neglected by their own United States Government.

Please excuse my errors in typing and etc. since I have cataracts on both eyes and have a difficult time sometimes in typing. I do feel these cataracts are the result of radiation I sustained in the nuclear and thermonuclear testing in the South Pacific in 1952 and 1954. If you will notice in enclosure (1) the Japanese do compensate their victims for radiation cataracts. However the V. A. differs in their rules and regulations to date. The Congress has awarded on presumption only 13 cancers in Public Law 100-321. If you will notice in enclosure (1) the Japanese government compensates for any cancer. I wonder why? Cataracts are most prominent in Atomic Veterans. We call cataracts a non-cancerous disability.

In this list of disabilities from Friends of Nihakusha, you will find additional non-cancerous disabilities and of course I have many of them and so do the other Atomic Veterans.

It is deeply felt if you would read enclosure (6) called the "Forgotten Guinea Pigs" which is a Congressional Oversight and Investigation Report, it is there you will find your answer. This is the only country in the world to purposefully to expose there veterans and innocent civilians to manufacture and detonate nuclear and thermnuclear detonations of Atomic and Hydrogen Bombs. I myself have documentated through the DNA Nuclear Test Personnel Review (Navy, the fact I have witnessed and seen the world's largest Atomic bomb named King on Operation Ivy on Nov. 15, 1952. I additionally have witnessed the world's first Hydrogen Bomb named Mike, which in reality was not a bomb but a device (building). I actually saw the flash at detonation with my naked left eye in which I am almost blind. The Task Force Commander of Operation Ivy orders from the beginning were to have the men face away from the weapon. In other words turn our backs to it. However, my Commanding Officer, Capt. W. L. Kabler ordered us to sit on the deck of our aircraft carrier and face the bomb. This is fact! This was a complete violation of the Task Force Commander's Orders. I was ducking and trying to press my eyes into my arms laying on my knees but I ducked too late. My left eye saw this instant flash of fusion energy. I pressed harder against my arm and believe it or not, I saw something red which I believe was my blood and then I saw the outline of the bone in my arm. It IS THIS BRIGHT! The hair on my arms was standing straight out due to the magnetic electric pulse generated by this weapon or device.

If you desire additional information on Mike and King which irradiated the veterans on Operation Ivy, then you only have to get my Radiation Claim C-18-2 9-499. I assure you..... there is good documentated information and facts about the lies the DNA through their VTPR committee perpetuated on the Atomic Veterans.

The documentation in my radiation claim might surprise you. Chairman Sonny Montgomery made the statement "there is a wealth of radiation facts in my claim." At this time I also request that you ask the House Veterans of Affairs Committee office to forward you my testimony which is reference (b). Not just my testimony but items (documents) I was not allowed to read but as Chairman Applegate stated "they will be placed in the Congressional report. Only until you read this documentation in 1987 will you begin to see the entire picture of distortion and misinformation which the DOE and the DOE through the DNA perpetuated on the Veterans.

It is most hard to understand why the same people that exposed ~~us~~, also evaluate us. Surely anyone can see that if they did do wrong then they would cover up. This is exactly what happened and is still happening. The enclosure (6) will verify this.

In 1975 the Department of Defense created the Defense Nuclear Agency. Accordingly the DNA created the Navy, Army, Air Force, Marine and Navy [illegible] programs to study the veterans who they sent in their claims through the V. A. The DNA has two purposes or policies (1) to promote nuclear weapons and (2) to evaluate the Atomic Veterans. There is a policies conflict as any fool can readily see. It is somewhat like asking the "fox to guard the Chicken Coop". Don't you agree? Only until the documents that the DOE controls releases these facts will you find justice for the Atomic Veteran. The DNA should not be the one to evaluate us since it is not to their advantage to tell the truth, since it would prove them to be liars and murderers; which they are! They knew as early as 1943 that radiation would cause cancer and genetic effects. Obtain my Claim 10-279-499 and you will find a letter addressed to Brig. Gen. L. R. Groves and this letter will documentate this. Even before they detonated the 1st bomb in New Mexico, they knew it would cause death. It is all there! (62 pages of it.) Another document in there about Groves states that he said " radiation is a nice way to die!" A comment similar to this. It is there!

Now, who does the research on the health effects of nuclear radiation. It again is the same people that exposed us..... the old AEC which is now the DOE. No wonder you can't find anything about radiation health effects in this country in medical books. The DOE is concealing the truth. I have documentated this in my earlier Claim. In my claim you will find where the DOE and their contractor DuPont at Savannah River Plant (I am familiar with this plant) didn't like a study because it would make them look bad. So guess what they did "They erased the data and substituted false data and hid it for 5 years". This was found out and they were told to let someone else re-do this study. To date I don't think they have. This can be verified by Bob Alvarez in Senator Glenn's office.

So what you have is the DOE and their contractors manufacturing the weapons but they are also in charge of all the research on the health effects of radiation. I think you would agree this is like asking "Dracula to guard the Blood Bank!"

[illegible] DOE [illegible] HEALTH RESEARCH BY DNA OR DOE? [illegible]

The Senate Government Affairs committee announced July 9th, 19[illegible] that it had launched an investigation into the legit. of energy's radiation health effects research program. A spokesman said, the investigation will look into possible [illegible] of the data results, DOE's use of facility, and the quality of [illegible] studies of DOE workers. Senator Glenn, [illegible] committee's investigation, noted that [illegible] results of this kind taking [illegible] "[illegible] [illegible] [illegible] [

> In a related action, Senator Wirth (D-CO) has introduced S. 972, a bill which would transfer DOE radiation health research programs to the Dept. of Health and Human Services. Rep. Lane Evans (D-Il) has introduced a similar measure in the House.

Thank God that some of the Congressmen and Senators are finally waking up to what really happened years ago and is still ocurring today. Perhaps it will help the widows and genetically effected children, who live in poverty.

However for most Atomic Veterans it is too late. Those that are not dead are living in pain and anguish. If the DOD and the DOE were not allowed to evaluate us and do research on us..... perhaps earlier we could have been helped. Someone that can be unbaised and unprejudiced must do the studies!

It appears to me that the V. A. with research facilities should have been the one to evaluate us and research us. The mandate of the V. A. I understand is "To help the veteran in need, his widow and child". Only until 1984 were we finally granted any help whatsoever in the way of acknowledging that perhaps there was a problem here; regarding our exposures to radiation. However I can assure you..... many veterans still get static from the V. A. Doctors. I understand this in away since perhaps they are ignorant in that there truly isn't much in their medical text books and pamphlets since the DOE has seen that little comes out about the true health effects of radiation. Japan certainly recognizes most of the diseases. However the Congress only awarded 13 cancers in P.L. 100-321. They left off the 8 most prevalent cancers that the victims (atomic veterans) are suffering. Nothing in the way of non-cancerous disabilities.

Under P. L. 98-542 which came out previous to P.L 100-321 a veteran has to show proof to the V. A. he was exposed to high doses of radiation..... to even think of getting compensation under P.L. 98-542.

So guess what the DNA does. They get an outfit called SAI to do all our calculated doses of radiation. They say calculated since they admit they don't know how much radiation we were exposed to. Now guess who SAI is..... they are a defense contractor whose primary job is to manufacture Tomahawk Missles, manufacture missle guidance systems and is in research in Star Wars up to their ears.... MAKING BILLIONS

It is just not in their best interest, while making dollars, to come up with estimates that are in anyway accurate. If they told the truth..... they know it will interfere with their manufacturing and they would lose money. This is part of the Pentagon Fraud! Having a Defense Contractor of the DOD evaluate us is improper!

At this point in my letter I would like to bring up Enclosure (2). I wrote this letter to the Director of the V. A. Radiology Service on August 24, 1988. Did you know that this Director wasn't even kind enough to answer my letter nor to write me after I called his office 3 times. I thought the V. A. had to respond to any letter if a veteran addressed an individual in the V. A. Is this correct!

I merely asked the Director "Where have you been?" I still Secretary Derwinski, want to know the answer to this question. Deputy Director Drash told me the Director was in charge of the policies and procedures regarding problems involving the Atomic Veterans and their exposures to radiation. Yes, I ask again..... Where in the Hell has he been!..... when the Atomic Veterans are suffering and face death due to their exposures. I honestly believe most of us are dead. After all only 2,472 Atomic Veterans called the DNA Hot Line since 1985. Where are the rest of the 250,00 veterans who were exposed to radiation?

Please note on Enclosure (2) page 5 I mentioned "Irradiation of Personnel at Operation Crossroads". In reality this report is the essence of what Colonel Stafford Warren said in papers that he left in a library in California. He was the Officer in Charge of Radiation Safety and measurement of radiation at the Crossroads test in 1946. Did you know that this one test Crossroads is the in depth study the DNA uses to evaluate all the veterans. I was on Ivy in 1952 but they use this in depth study to evaluate all of the tests. Check with the DNA if you don't believe me!

When you request my Claim C-18279-499 you will see the Irradiation of Personnel at Operation Crossroads Report. You will also find it in the Congressional Committee Hearing which is reference (b).

What is amazing is the fact that the DNA asks SAI to do calculated doses for the veterans. In the dictionary calculated means guess! The V.A. accepts guesses!

In Irradation of Personnel at Operation 1946 Crossroads you will find out that Dr. Karl Z. Morgan requested Colonel Stafford Warren to let him go measure the radiation since he was sure the men were being over exposed. He did so and you will see where he measured 3 Beta to 1 Gamma ratio dosages. The film badges would not measure beta. The film badges would only record up to 2 rems of gamma. Morgan measured the Beta and found on decks and gunmounts that the Beta radiation had become accumulative and he found as much as 600 Beta to 1 Gamma. Amazing isn't it! Here are actual measurements but the V.A. won't accept them!

It was so hot in the tropical climate in the Marshall Islands that we couldn't sleep below decks..... so where did we sleep..... in gun mounts and on the flight deck where the decks were cool at night. However the Beta was absorbed into the paints and reisins of the paint, on lines, and in the porus decks of the wooden flight deck. I can verify 5 to 6 fallouts on my ship the Kennova!

In reading my health record (Navy) and the after effects of my illnesses, (Morgan) he estimated I got between 10 to 100 rems of gamma and between 100 to 300 rems of beta. All of this information and his statement that I am service connected is completely ignored by the V. A. The V. A. takes the DNA word from the SAI contractor that I got only 0.42 rems internal and external. In other words the DNA word is the Bible to the V. A. no matter what world renowned nuclear health physicist state. Why?

For the moment lets take Enclosure (3). Commander R. T. Bell with the Navy NTPR and the DNA states in the NARS vs Turnage trial when he was given the facts about Colonel Stafford Warren's papers and Irradation of Personnel at Operation Crossroads, he stated this was new evidence. Read enclosure 3. He also stated this document was not availableduring the dose reconstruction by the Agency. Read my radiation claim and you will find proof that I gave him this prior to the trial and it is documentated in letters I wrote to him that are in my claim. I call him a liar and also know he committed perjury.

I also remember that Bell made the statement that he was a Nuclear Physicist or either Nuclear Health Physicist due to his on the job training in the Navy. I asked in my correspondence to him which is in my claim what academic training he had had and what was his job. As I remember he stated he was something of a nuclear technician, or either medical technician. I still would like his training that enables him to evaluate us. Yet no matter what the DNA states..... the V. A. takes their word as if it is the bible. This to me is lunacy!

At this point I would like to add another enclosure which will be enclosure (8). This enclosure encompasses information about a [illegible] has been re-introduced before Congress in 1989. Nevada's Senators [illegible] Bryan took the lead this year in the Senate fight to repeal the "Warner Amendment." Their bill, S. 982 was introduced early May with 37 additional Senate co-sponsors. A similar bill was introduced in the House by Nevada's two representatives (Vucanovich and Bilbray) HR. 2295.

The Warner Amendment came about at the urging of President Reagan to Senator Warner. Senator Warner was told the Atomic Veterans were being taken care of by the Veterans Administration. This was in 1984. They were assured this by the Dept. of Justice and the Dept. of Energy. This amendment to a Defense Authorization Act was pushed through without going through proper channels. Is this proper.

Since Agent Orange Veterans had sued the manufacturer, the Dept. of Justice and the Dept. of Energy were worried that we might sue the manufacturers of radioactive elements that make up the Hydrogen Bombs. The funny part is that even though we would sue the manufacturer, they would not have to pay one portion of an award. The U. S. Government would have had to pay. This is how the Defense Contractors are protected.

In essence the Warner Amendment, as soon as a lawsuit is instigated, allows the U. S. Government to step into the Defense Contractors shoes.

The Federal Government has unique defenses which cause dismissal of all suits which are brought before a State Court. These include the "discretionary function", in which the Government can harm or kill a citizen "for the countries good" as well as "sovereign immunity", in which the Government does not consent to be sued, a relic of the British law interpreted to mean "the Kingcan do no wrong".

Due to this Amendment that Warner sponsored and which was passed, to date, over 300 lawsuits in California and Nevada have been dismissed because of Senator Warner's three paragraph amendment to the Defense Funding Act of 1985.

The greater opposition to the repeal of the Warner Apeal is led by the University of California Berkeley Weapons Labs and contractors who are already fully indemnified for litigation costs stemming from their "acts and omissions" in building and testing atomic weapons.

I feel the University of California is more worried about the prestige of the University..... than those Atomic Veterans, their widows and the genetically effected children. Secretary Derwinski do you think this is right and proper to treat veterans most of them WWII and Korean Veterans who are combat veterans and who fought for the flag and their country. This is a gross insult to the veterans in this country! Do you agree!

I include the information encl 8 which is in a letter that I forwarded to all the NARS members in the state of Virginia. It will update you completely in every way.

So far I do not know what your opinion is on what I have already typed in this letter but there is still more to come which you will find unbelieveable!

Sec. Derwinski ltr. -7-
dated July 21, 1989

Now lets take enclosure (5). It will give you the medical information that all previous studies on radiation up to Sept. 1987 are quite invalid. This is far reaching since in essence it will turn the radiation protection system completely up side down.

First let me say that around 1949 an agency was formed called the Atomic Bomb Casualty Commission, which was composed of both American and Japanese scientists. The American portion was under the aegis of the National Academy of Sciences and the Atomic Energy Commision AEC (which is now the Dept. of Energy). This study of the health effects of those survivors (Hibakusha) was the epicemiology study of the Japanese victims. Today and yesterday, all studies including the BEIR (Biological Effects of Ionizing Radiation) which are done by the Nat. Academy of Sciences and the United Nations Studies called UNSCEAR. All BEIR AND UNSCEAR Studies up to Sept. 1987 are quite invalid. NAS is on payroll of DOL and DOE!

The facts as I understand them and you can read the facts in enclosure (5) is that the Hiroshima Bomb was one of its kind. It was a uranium bomb and not a plutomium bomb. A mock bomb was studied and in turn it was found that their was 75 to 80% more mortality. They underestimated the low let radiation. It was not high ionizing radiation that hurt the victims but low let radiation. This is my understanding. Therefor this blows a hole in what the DNA has been doing with the studies on radiation on Atomic Veterans.

This effects the entire Nuclear Community. Medical workers, uranium miners, Atomic Veterans, medical community and etc. Therefore all radiation dose standards must be lowered. For the nuclear worker it must be reduced to at least 1.5 rems occupational exposure dose. I have it confirmed that the United Kingdom is not waiting and that they have reduced their occupational exposure dose to 1.5 rems per year.

Early in my communication with Commander Bell with the Navy NTPR group, I was told that all studies of Atomic Veterans was based on BEIR III 1980 and UNSCEAR 1982.

Since these studies are invalid then every one of the studies the DNA and NTPR groups did IS COMPLETELY INVALID.

I knew this early as 1984 when I read Radiation and Health which is a medical text book which was published and authored by Dr. John W. Gofman both a Nuclear Physicist and Medical Doctor. He is a friend of mine and I am in communication with him and I will forward to you some pamphlets that he printed that will give you additional information. He is the Chairman of the Committee for Nuclear Responsibility. I would also suggest that you get his new book published in 1988 which is titled Radiation - Induced Cancer from Low-Dose Exposure. There are also other references at the end of the print out. /read this book!

The old ABCC I mentioned earlier was eventually replaced by the group called RERF which is Radiation Effects Research Foundation which is still a joint American and Japanese effort. So it was in 1987 (Sept.) that the RERF study came out. This study made the BEIR III 1980 invalid and also UNSCEAR 1982 invalid. All the studies by the DNA completely invalid. Please note at this time in the pamphlet called Revival Movement in Radiation Land by Gofman I mentioned earlier one of the refereneces is the RERF 1987 study. Gofman and Morgan both knew the BEIR III and UNSCEAR 1982 was invalid as early as 1973. Others also! Even the Chairman of BEIR III 1980 who is Dr. Edward Radford knew this. This is detailed in enclosure (5). In fact Radford wouldn't go along with BEIR III 1980 so he was excluded even though he was the Chairman. We do have decent scientist in this world I have found out. still under aegis of DOE & NAS

This leads me into enclosure 7 which is a letter addressed to Mr. Fredrick Conway who is the Executive Secretary for the Veterans Administration Advisory Committee on Environmental Hazards. This is the group within the V.A. which was formed after the Atomic Veterans and Agent Orange Law P. L. 98-542 was passed by Congress. Remember under this law we have to show a high dose of radiation which the DNA did purposefully so we couldn't win our cases since the Defense Contractor called SAI only gave 99% of the Atomic Veterans who filed claims a calculated (guess) dose of less than 0.50 rems. We stood no chance since they boxed us out. However under the RERF it was not high ionizing radiation but now low ionizing radiation. In other words their is no longer any safe dose of radiation. PERIOD!

I believe in enclosure 7 which is a letter/to the V. A. Advisory Committee on Environmental Hazards from Dr. Karl Z. Morgan dated Feb. 15, 1988. Read the letter and you will see unfolding what I have expressed earlier.

It so happened I was invited to appear on Feb. 18, 1988 before the V. A. Advisory Committee on Environmental Hazards on the date I just mentioned. I now ask that you request from Conway all the 20 some odd enclosures which includes the RERF 1987 study. It is all there the complete study.

Of utmost importance is that this effects all veterans. In fact it is a part of my radiation claim. (C 18-279 499). I told Chairman Kenneth Eaton of theBVA of this study and in fact it is included in my claim. I filed disagreement with the BVA. If this is in my file or claim then what they passed down certainly in no way is a complete valid denial. My claim is still valid as it always will be. I do have radiogenic disabilities. They are not cancerous yet but even non-cancerous they should be approved. Expecially my cataracts and the degenerate joint muscle deasease.

They tried to shut me up at this committee meeting but I read my letter which I read to the committee and managed to comment on all 24 enclosures. I then walked out since I felt this committee was completely almost Pro-Nuclear going along with the DNA. I still feel this way. You have to get scientist in the committee to offset this and in turn stand up for what is right. I feel this should be done immediately if the Atomic Veteran is to get justice. However if this continues then what will happen is exactly what the DNA desires. FOR ALL THE ATOMIC VETERANS TO DROP DEAD! They have almost succeeded! Enough on this subject!

Last is the enclosure (4) which is my report to the Dept. of Energy at the Scoping Hearing in April 20, 1989. It contains information about the NAIS vs Turnage Trial, the encl. (6) The Forgotten Guinea Pigs which I have commented on earlier, plus it contains a statement by Dr. Louis G. Willians, Emeritus Professor of Ecology, University of Alabama in which a article from Science News Jan. 2, 1988 titled Radon data misleading. In this article he verifies the Savannah River, the Tennesse River and the Clinch River were contaminated as early as the 1950's and 1960's.

Also attached to enclosure 4 is a letter from the Subcommittee on Energy Conservation and Power of the Committee on Energy and Commerce dated Oct. 24, 1988. This letter addressed to Sec. John S. Herrington, Dept of Energy details and I quote:

> "This report reviewed Dept. of Energy documents, which revealed the frequent and systematic use of human subjects as guinea pigs for radiation experiments sponsored by the Department predecessor agencies."

This report describes in detail 31 experiments during which about 695 persons were exposed. American citizens thus became nuclear calibration devices for experiments run amok!

This about concludes this letter but I wish to inform you that another study is under way called BEIR V 1989. I understand it will be forthcoming in August 1989. Arthur Upton is the Chairman. I certainly hope that it tells the truth. I await the study which I have asked Congressman Spence to forward to me. In other words the DOE wanted to continue the 5 rem dose per year for nuclear workers. This means the bodies are still piling up..... more exposures to excessive doses of low ionizing radiation and the workers are completely unaware of the dangers.

Now regardless of what BEIR V 1989 states..... everyone including the ICRP International Commission on Radiological Protection, which has been known as the Bible in dose standards internationally is still going to put off reducing in this country dose standards and they will await the UNSCEAR studies I understand which might not come off until 1991 or 1992. THE BODIES ARE PILING UP. The veterans (atomic) are being put off because of money, greed, and personal esteem by greedy politicians, bureaucrats and self interest in the stock markets (money). The military can still use their nuclear toys to have wargames perhaps or explode underground detonations that emit radiation due to fissures in the earth in Nevada that is cracked badly.

So to detail what happens to the Atomic Veterans..... After 44 years since the Atomic Bombs were dropped on Hiroshima and Nakasaki..... scientists have done studies that are completely invalid since 1945. The bottom line is that pretty soon you won't have to worry about the veterans..... we will be dead. However the mandate does provide for widows and children. Speaking of the mandate of the V. A. Perhaps they can be helped.

What is apparent is that the DOD and the DOE can no longer be trusted. We knew this years ago. Isn't it time for the Veterans Administration to wake up and see the facts as I have described them.

I have only tried to documentate to you facts as I see them and understand them.

It would be appreciated if I could have your comments on the contents of this letter and its, enclosures!

Sincerely,

Edward V. Fenton

Edward V. Fenton
656 Boulevard N/E
Orangeburg, S.C. 29115
Phone 1-803-534-7704

Copy to:
Senator Thurmond
Congressman Spence
Senator Wirth
Senator Cranston
AP and others of concern!

Note: I live on less than $500.00 per month Social Security. Due to this I cannot foward copies of enclosures to everyone. I am sure that Secretary Derwinsky and his staff would foward all enclosures if they are requested! My funds are quite limited! I can just barely make ends meet. The V. A. does refuse me even non-service connected and service connected disability. Why!

I further believe my Radiation Claim C 18-279 499 is still valid since I am right on the facts as stated in this letter. I further requested the academic record in nuclear physics and health physics on my BVA examiners. I do not feel they are qualified to judge radiation claims. I still await this information from Eaton which he never forwarded to me. Why? My facts are correct in my claim!

FRIENDS OF HIBAKUSHA

C. E. Hagen
0349 Bucknell Cir.
Tenth VA 23464

1759 Sutter Street, San Francisco, California 94115 (415) 567-7599

June 20, 1988

Mr. Edward "Victor" Fenton
National Association of Radiation Survivors
656 Boulevard, N/E
Orangeburg, SC 29115

Dear Mr. Fenton:

Kanji Kuramoto forwarded your letter regarding disabilities related to the radiation exposure of the hibakusha which are recognized and compensated by the Japanese government. The diseases and conditions compensated by the Japanese government are:

1. Anemia. Leukemia
2. Liver Function Abnormalities (except viral or serum hepatitis)
3. Cancer
4. Endocrine (hormone) Abnormalities: e.g. Diabetes mellitus
5. Stroke, Brain Hemorrhage
6. Circulatory Organ Dysfunction: e.g. Hypertensive cardiovascular diseases, etc.
7. Kidney Dysfunction: e.g. Chronic nephritis, nephrotic syndrome
8. Visual Organ Dysfunction: e.g. Cataract (except hereditary type)
9. Respiratory Organ Dysfunction: e.g. Lung tumor
10. Musculoskeletal system Abnormalities: e.g. Deforming arthritis
11. Digestive System Abnormalities from Ulcer/Inflammation: e.g. Stomach ulcer.

A description of the types of benefits provided by the Japanese government is given in the enclosed "Resume of Measures for Atomic Bomb Survivors in Japan" published in 1985. This is the most recent description of the Japanese medical program that I have. The Ministry of Health and Welfare probably has more recent publications. Mr. Shigeo Miyoshi of the Ministry of